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ABSTRACT

This booklet was published in observance of the twentieth year of the Freedom of Information Center at the University of Missouri-Columbia. It includes seven speeches about the right to know or freedom of information movement that seeks to end government secrecy. The authors of the speeches are: Paul Fisher, who discusses the history of the Center; Hugh Boyd, who reviews the development of the idea of creating a form to actively support rights of access to news; James Pope, who describes the efforts of four men who have contributed to the effort; Samuel Archibald, who evaluates a public relations program aimed at the Congress, the press, and the public; Richard Salant, who speaks of the importance of a worldwide free flow of information; Carol Loomis, who discusses personal experience of recent requests for material under the Freedom of Information Act; and Russell Wiggins, who analyzes a trend toward secrecy in the name of privacy. (MKM)

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A FREEDOM OF INFORMATION RETROSPECTIVE

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in observance of the twentieth year of
THE FREEDOM OF INFORMATION CENTER
University of Missouri-Columbia
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PREFACE

Journalism week at the University of Missouri-Columbia in April of 1978 was the occasion for a gathering of eminent news people who paid tribute to, and shared memories about, a right-to-know crusade begun almost thirty years ago. The eloquence of the formal speeches they gave on the freedom of information movement is preserved here as a written record of the fight to end government secrecy.

Paul Fisher sets the stage with a reminiscence on the ups and downs experienced by the Freedom of Information Center in twenty years of documenting "things seen and noted along the broad and winding road named Freedom of Information." Closely tied to this is Hugh Boyd's review of how the idea of creating a force to actively support rights of access to news eventually resulted in establishment of the Center.

In the keynote address of the week, James Pope says the time has come to "identify indelibly the true heroes of this enterprise," and he does so in a spirited account of the efforts of four men.

Sam Archibald had a hand in the development of the Freedom of Information Act, as well as its amendments, and from this perspective evaluates the success of an FoI "public relations program" aimed at the Congress, the press and the public. Taking a larger view, Richard Salant speaks of the critical importance worldwide of a free flow of information and reminds journalists that they themselves might in some ways be diverting that flow. Carol Loomis turns the discussion to a more personal level by sharing good news and bad news about her recent requests for material under the Freedom of Information Act.

Concluding the collection is Russell Wiggins' analysis of a trend toward "secrecy, in the name of privacy," which was given as the Earl F. English Lecture on the university campus in November.

Paul Fisher

THE FIRST TWENTY YEARS

THE FREEDOM OF INFORMATION CENTER has been quartered since 1959 in a long room stretching the end of a wing of the School of Journalism, University of Missouri-Columbia. In the attic above, non-active files rest in about 100 cabinets. All this paper upsets the fire marshals, and smaller certainly would have been more beautiful, but early decisions about goals of the Center assured the mass of paper.

When the Center was younger, a visiting editor noticed—and snorted at—a case file on the *Tropic of Cancer*, then a favorite of censors. Whatever Miller was saying, and whatever his problems with government in getting it said, it was not the kind of information that concerned the editor and his kind at the American Society of Newspaper Editors and Sigma Delta Chi, who were then battling for federal and state legislation to open to the public the meetings and records of public servants. When well-wishers—this editor among them—launched the Center, they thought it was to be the "historian" of the freedom of information battle, a place to turn for news of progress on the fronts at Washington and state capitals. How could the fate of a book concern the Center?

The Center defined "information" loosely: whatever knowledge might be needful or useful to the political and economic–the general–advancement and well-being of the individual.

The Center's concern was for the potential recipient of information: his right to know it, to accept it or reject it.

Here's how. The Center defined "information" loosely: whatever knowledge might be needful or useful to the political and economic—the general—advancement and well-being of the individual. So that's how Miller got in the files, and Lawrence and Salinger; and later, *Deep Throat* and sundry CIA whistleblowers and people who wore T-shirts with disturbing slogans in court—all the people having something to say but experiencing difficulty with government. The Center's concern was for the potential recipient of information: his right* to know it, to accept it or reject it.

A fifteen dollar check arrived from Broken Arrow, Oklahoma, and pinned to it was a quotation of Francis Bacon: "For whatever deserves to exist deserves also to be known, for knowledge is the

Paul Fisher, a professor of journalism at the University of Missouri-Columbia, has been director of the Freedom of Information Center since its beginning.

*"Right." A very troublesome word. With the same airy innocence as the fellow who figured he had "a right to sing the blues," the Center figured that the people had a right to know. The Center is in the vanguard of jurisprudence here—but where else did it have to go but to the front?

image of existence and things mean and splendid exist alike." The Center was encouraged, felt it was on the right track, wished it looked narrower up ahead, but held no hope of that.

THE CENTER never assumed that news industries were the sole carriers of information to the people. The more conspicuous advocates of freedom of information came from those industries, true, but there were quiet and effective champions from other industries and from the arts, which also experienced efforts by government to control. So the Center embraced in its study all means of communications—books, advertising, the theatre, motion pictures. "The right to read" was, after all, just the librarian's way of saying "the people's right to know."

The Center elected to study not only the barriers government raised to information flow but also those put up by the communications industries and social groups.

Finally, in another wide-swinging decision absolutely guaranteed to fill the attic with files, the Center elected to study not only the barriers government raised to information flow but also those put up by the communications industries and social groups: any action—law, boycott, self-regulation, or whatever—stemming or altering the flow.

In a speech shortly before his death, Edward R. Murrow called for an agency that would do just that. He never knew of the effort being made at the University of Missouri to become such an agency. That effort continues to be made.

More precisely, by whom? A pickup gang. The Center has never been anything more than an ever-changing company of several paid staffers aided by graduate students and directed by a faculty member whose primary responsibility is teaching.

An advisory committee drawn from the news businesses guided the Center in its early years and recommended that it proceed in two opposite directions. One faction would have had the Center militantly championing the cause. "We need help," said one broadcaster, "in rescinding the Rayburn Rule (no cameras allowed in Congress). If a university raises its voice, it can't be accused as we can of a special interest." An observer for a foundation remarked that even a slight increase in the voice of the university might bring unwanted attention from the legislature, its ultimate master.

The other position was represented by the publisher who said, with no apologies to Churchill, "Give us the facts, and we will do the job."

Done. That was what the Center would do—supply the facts. And that is how it lost a substantial part of the original committee. It would not be an advocate. ("What the hell," said a broadcaster, "you'll only be a library. We got a better library than you'll ever be.")

The policy of non-advocacy was to jaundice many.

The policy of non-advocacy was to jaundice many like the publisher who, after hearing that a Freedom of Information Center was operating at the University of Missouri, called on it forthwith to open the traditionally closed meetings of the university's board of curators. Sorry. Not possible.

The restructured advisory committee began to meet annually

and regularly advised the Center to make headlines to assure future solvency.

THE CENTER has never lacked reasons to explain its failure to attract wide attention and support—non-advocacy being at the top of the list, of course. Freedom of information—understood narrowly as the legislation of access—has never been a highly marketable item, for many in the news businesses have always felt it safest to place complete faith in the First Amendment, that constitutional rock, and not to play around with legislative sand castles. If a specific access problem arises, they reason, it's a legal matter and for that, legal counsel is needed.

Freedom of information–understood narrowly as the legislation of access–has never been a highly marketable item.

Missouri news business owners have argued that they support the Center, an adjunct of the state university, through the taxes they pay. Out-of-state owners have pointed to the need to support their local schools. The Center has carried its cup to the foundations, to be met with limited success and the ritualistic suggestion that it seek salvation from its "natural constitutencies"—the news businesses.

Usually the news business owners have not known of the Center's existence until the moment of dunning. The Center fervently hopes that this unawareness accounts for a finding by outside surveyors some years ago that the owners would not miss the Center if it were forced to close.

News—problems incident to its gathering, at least until the legal troops are called out—that's the concern of news staffs. Over the years, the Center has been useful to hundreds of staffers (Thousands? No one has been counting.) and they have, presumably, been grateful. As have students and scholars aided in their papers and debates ("Please send all the reasons the press shouldn't be free."). But the Center's natural constituencies have been generally long on requests, short on cash, and difficult to use in ploys of publicity. Just no headlines there at all.

The Center's natural constituencies have been generally long on requests, short on cash, and difficult to use in ploys of publicity.

FOR A TIME, the Center underwrote a small office in Washington—the place the whole operation should have been from the start, some said—and here it managed a modest success in elevating its flat silhouette a fraction. There were some headlines (oh, proud day, even a banner once in a metropolitan daily) attendant on such revelations as that of a secret request made to liquor lobbyists for free booze for a military bash; the excessively high costs for copies of a State Department feuilleton telling Congressmen how to spend counterpart funds while traveling overseas; and so forth, all rising out of requests under the new, and not much used, Freedom of Information Act.

For a time, the Center underwrote a small office in Washington—the place the whole operation should have been from the start, some said.

The Center never strayed further from its position of non-advocacy than when it became party to the litigation seeking release of that part of the Pentagon Papers not in the set first disclosed.

Inevitably, word of some of the Washington activities got back to the campus and there were rustlings in the administrative cotes. But that was all. Economics, nothing else, forced the Washington office to close. So much for headlines.

Off campus, the Center is known today mostly through its publications: a monthly report or two, usually on press-government issues, and a bimonthly digest of things seen and noted along the broad and winding road named Freedom of Information.

Off campus, the Center is known today mostly through its publications: a monthly report or two, usually on press-government issues, and a bimonthly digest of things seen and noted along the broad and winding road named Freedom of Information. At one time, the publications reached 5,000 addresses every month; that number plummeted when addressees were asked to become subscribers, of which there are now about 1,300.

The Center's first publication (*Fol Digest*, May-June 1959) was distributed to the National Editorial Association (now the National Newspaper Association), whose resolution at the 1957 Chicago convention that some school should establish "a clearinghouse on freedom of information" stirred interest at the University of Missouri.

The idea meshed with School of Journalism plans for a year-long celebration (1958-59) of journalism education's first half-century; it made a neat centerpiece for the table fund-raisers were then laying. When the year and its observances were done, all remaining funds were to go toward operation of the Center. And so they did. In 1959, with not yet even a file cabinet moved in, the Center had $100,000 and more in the bank. It has never been so solvent since.

In 1959, with not yet even a file cabinet moved in, the Center had $100,000 and more in the bank. It has never been so solvent since.

The handsome dowry disappeared many years ago. One way or another, under this guise or that, the University of Missouri has paid a lot of bills—$2 million over the 20 years understates the amount—and in this it has been helped by "sustaining members," varying in number from 200 to 300, and by the sale of subscriptions. Only rarely have money and personnel for fund raising been available. Although professional fund-raisers indicate they could raise a merry din with the Center's cash register, they've not been asked to try. The dean of the School of Journalism makes phone calls in December: That's the extent of present fund raising.

The Freedom of Information Center enters its 21st year having kept the promises once made.

SO THE FREEDOM OF INFORMATION CENTER of the School of Journalism—an unbudgeted program at the University of Missouri—enters its 21st year, having kept the promises once made. It seems likely that if, in the future, believers press on to establish "the people's right to know" as fully recognized under the Constitution, they will find here, at the end of the hall and in the attic above, the fullest documentation of the belief that the right to gather and receive news is the other side of that free press coin, the First Amendment.

Hugh Boyd

FOUNDING AND FUNCTIONS OF THE CENTER

I AM HONORED to be asked to give you a brief history of the Freedom of Information Center's establishment, formation and activities for the past 20 years. It seems incredible to realize that the Center has had such a long life and that it is now about to come of age.

To go back to the beginning, I would like to quote a statement made by James Pope at the annual ASNE convention held in April 1952. Jim was then managing editor of the *Louisville Courier-Journal* and chairman of the ASNE Freedom of Information Committee.

After discussing the general activities of state freedom of information committees, Jim made this statement, which is the cornerstone of what became the Center's purpose and promise: "We look forward to the time when there will be a national council of representatives from state committees." Continuing, he said, "By close cooperation among ASNE, APME, Sigma Delta Chi, and such a council, we can create an immediate responsive force against which few offices of government will want to pit their secretive ambitions."

"By close cooperation among ASNE, APME, Sigma Delta Chi, and such a council, we can create an immediate responsive force against which few offices of government will want to pit their secretive ambitions." –James Pope, ASNE Convention, 1952

Jim then directed the attention of the audience to two basic issues. First, the importance of forming a national council of representatives from state freedom of information committees. Second, and equally important, Jim Pope discussed the role such a council should play and the importance of that role in its effect on offices of government and their willingness to "pit their secretive ambitions" against such an organization.

A GOOD DEAL of interest was generated as a consequence of Jim Pope's statement and as a result of a number of speeches made and discussions held regarding the formation of such a council. Four major media associations that had already demonstrated a deep interest in the freedom of information issue demonstrated further interest by passing resolutions indicating their belief that a need for a council existed.

The council came into being in 1952 and continued to function

Hugh Boyd, a newspaperman for 45 years, is presently board chairman and editorial chairman of the *Home News*, New Brunswick, N.J. President of the Freedom of Information Foundation, he has been active on numerous freedom of information committees since 1950.

The council came into being in 1952 and continued to function in the interest of developing and supporting freedom of information programs between the years 1952 and 1958.

in the interest of developing and supporting strong freedom of information programs between the years 1952 and 1958. To illustrate, in December of 1952, *Editor & Publisher* reported that ASNE and APME have "joined hands to do a more effective job in keeping the channels of news open through their Freedom of Information committees."

On September 2, 1953, Virgil M. Newton, then chairman of the Freedom of Information Committee of Sigma Delta Chi, in a letter to Norman Isaacs, then president of the Associated Press Managing Editors Association, said, "I heartily agree with you that a national newspaper Freedom of Information Council, embracing the entire profession should be formed."

In October 1953, the Freedom of Information Committee of the National Editorial Association recommended first to the Pennsylvania Newspaper Association and later to the National Editorial Association that "the national newspaper associations which are most directly concerned with the Freedom of Information problem name a committee to study the possible formation of a national freedom of information council."

In November 1953, the Committee for the Advancement of Freedom of Information of Sigma Delta Chi recommended "the formation of a national council for the advancement of Freedom of Information to be composed of representatives of all national press and radio organizations, including publishers as well as editors, *which not only will keep a constant patrol of the governmental front* and a complete record of all cases, but which, when it raises the voice of protest against abridgement of the rights of the American people, will be the voice of the whole press and radio profession." APME at its annual convention in November of 1953 recommended "empowering its President to name representation to a committee drawn from various press groups to study whether the present informal and effective cooperation shall be formalized in a national freedom of information council."

This gives an idea of the importance of forming some group concerned with freedom of information matters, as expressed in the formal records of the organizations—ASNE, APME, SDX and the National Editorial Association.

There was a desire to try to unify the efforts of those individuals and organizations concerned with the growing problems that appeared to limit rights of access to the news and, consequently, the possible limitation of news available for publication.

SO, AS CAN BE SEEN, a move was getting under way to devise ways and means of improving and expanding the present methods used to contend with the freedom of information issue. There was a desire to try to unify the efforts of those individuals and organizations concerned with the growing problems that appeared to limit rights of access to the news and, consequently, the possible limitation of news available for publication.

Now we had a group of people who had been authorized by their respective parent organizations to work together. We had interest, enthusiasm and encouragement expressed by those concerned with this issue. But we had no home where we could work

together, and we had no funds to support our proposed activities.

Then we found our home and our support. Right here in Columbia, Missouri. And in Columbia, Missouri, the University of Missouri School of Journalism made us feel welcome, gave us a home and took us in as part of the program that had been developed to recognize the 50-year life of the school.

We were encouraged by this tangible evidence of support; we were gratified by the warmth of our reception at Columbia and by the encouraging interest shown in what we were trying to accomplish in the increasingly complicated world of freedom of the press, of challenges to such freedom and of efforts to support the principle of freedom of the press and of access to news.

Our first meeting was held on the campus in March of 1958. The Center was now a reality, not just a hope.

Our first meeting was held on the campus in March of 1958. An enthusiastic group of some 20 people met to discuss plans and programs to establish a course to pursue. The Center was now a reality, not just a hope.

During the past 20 years, we have developed an extraordinarily complete file of matters pertaining to press freedom in general and freedom of information in particular. The Center also publishes a number of publications that we believe are helpful to those interested in the cause: namely, an increasingly effective and important freedom of information plan and program. The publications are distributed widely. And we answer somewhere between 2,000 and 3,000 queries a year regarding many freedom of information problems.

The Center's publications are distributed widely. And we answer somewhere between 2,000 and 3,000 queries a year regarding many freedom of information problems.

Although 20 years have passed and our program has been reasonably successful, those associated with the Center know that it can be expanded and improved and that it can be more effective than it is at present. Dedication to this issue and enthusiasm for our efforts are clear and present.

The 20 years have been interesting and happy ones marked by some successes and some failures. There is a great deal more to be done, and those of us who have been deeply involved in the program since its inception in 1952 are grateful for those things which have been done to assist us, and we are enthusiastically hopeful that our efforts not only will continue, but will be expanded, and that they will be effective in the cause we have embraced.

THIS ALL STARTED 20 years ago with Jim Pope expressing an idea. That idea has become a reality. We hope it will become increasingly effective, and we look forward to the days and efforts that lie ahead. To sum up, I would like to quote the statement made by James Madison: "Knowledge will forever govern ignorance. And a people who mean to be their own governors, must arm themselves with the power knowledge gives. A popular government without popular information or the means of acquiring it, is but a prologue to a farce or a tragedy, or perhaps both."

James S. Pope

THE ROOTS OF FREEDOM OF INFORMATION

This 20th birthday of the Freedom of Information Center is the time to edit the record and identify indelibly the true heroes of this enterprise.

IT'S GOOD to be back on this campus. When Paul Fisher called to invite me, he didn't tell me just what to do. But his voice roused many echoes and lit up memories I want to share with more candor than I have given free range heretofore. My only honest role today is to clarify some early history. This 20th birthday of the Freedom of Information Center is the time to edit the record and identify indelibly the true heroes of this enterprise.

The working press was never the definitive instrument of FoI, but a natural catalyst. Indignant editors did spot a cancer of secrecy in the lifeblood of American self-government and apply some primitive medication. But the only enduring cure was the product of four modest alchemists: a lawyer, a congressman, and two unlicensed "physicians" right here in Columbia. In my last of many words, I have to purge my conscience. If the first person singular seems intrusive, I promise it will fade. Weird circumstances governed the opening moves of this game, and as conflict became urgent, there was not time for comfortable conference calls to committeemen editing newspapers all over the country.

The editorial genesis of FoI was purely providential. The subsequent mountains of public information just grew from a few petty molehills in Washington. I am inclined to be amused by them now, but thank heaven they were fissionable, with a garish fallout that lighted our random course.

I BECAME chairman of the just-created Freedom of Information Committee of the American Society of Newspaper Editors in 1950. My only predecessor, Basil Walters, had been given the earth—the whole earth—as his province; his report justly bristled with iniquities in places like Guatemala and Pakistan. But Walters saw the truth and he warned our Society to put on bifocals. News suppression was an untaxed American import. The Society applauded and adjourned to the Statler bar. I went home to get out my paper and see what happened. What happened was that for three years I barely had time to read it.

The first jolt came where I lived, from Molehill No. 1. The U.S. Board of Parole refused to name for the *Courier-Journal*'s Washington Bureau the endorsers of a parole application for a man in prison for

James S. Pope began his newspaper career in 1925 as a reporter. When he retired in 1961, he had been for 10 years executive editor of the *Louisville Courier-Journal* and the *Louisville Times*. It was largely because of his efforts that the American Society of Newspaper Editors initiated the freedom of information movement in 1948.

income-tax fraud. "Dammit," I told the city editor, "we'll get that list"; but my new job of information-getter never occurred to me. As managing editor, I wired the parole people, who promptly snubbed us. As I worked on a letter came the first slow dawn, and I tore it up. I wasn't a lone editor: I was all of them. The Society had told me so. It wasn't one story at stake but thousands. And in my desk happened to be some new ASNE letterheads. I used one and we hit the jackpot—the handle pulled by an unsuspecting tribe of journalists.

I wasn't a lone editor: I was all of them. And in my desk happened to be some new ASNE letterheads. I used one and we hit the jackpot.

Well, the parole board gave up the names and the magic formula became clear. But they added a warning: "In the future desired information will be supplied if, in our opinion, such information would be compatible with the welfare of society."

For the first time, this game showed signs of being fun. With a short word of thanks, I suggested to the parole board that if the Constitution had not intended for society to determine its own welfare, they'd all still be working for George III.

I suggested to the parole board that if the Constitution had not intended for society to determine its own welfare, they'd all still be working for George III.

SOON, as if on cue, here came Molehill No. 2. The *Knickerbocker News* learned that bartenders all over New York State were watering their whiskey, and a chorus of editors so far lukewarm about FoI cried "Zounds!" Again on ASNE paper went a demand that the Alcohol Tax Unit do something, which brought the reply in injured tones that: "This settlement is of concern only to the proprietor of each tavern and to the ATU."

Providence had stacked public officialdom with enough rockheads to pave our way. Our next letter was made so self-important ATU thought every editor alive had his right hand on my old Underwood, ready to throw it if necessary. In due time, the *News* got its story, but FoI was still in the first day of creation. With these tactics we faced a thousand-year war, until Congressman John Moss demolished the time-frame. He wrote me: "Internal Revenue Commissioner Caplin has informed [us] that IRS no longer will keep secret compromise settlements with moonshiners, bootleggers and other law violators."

Such victories gave our committee a lift and a spurious celebrity, but the foundations of secrecy were hardly rocked. The real impact was on our self-confidence; our eyes were opened to a pre-publication power of the press. Other mulish molehills scrambled for notice and enriched our files. I asked a Midwestern alderman why his board met in secret and he said, "Look, if you quote what we say it would make us all look like damn fools."

Such victories gave our committee a lift and a spurious celebrity, but the foundations of secrecy were hardly rocked.

For contrast, I cite one early case where we had to approach a major authority and speak with respect. The principle at stake was fundamental.

In the early 1950s, military planes were falling all over the map. And whether on a public highway, a golf course or a farm, military police took possession. A crash near Port Clinton caused nearby papers to seek our help.

We asked the Secretary of the Air Force if he really thought

peacetime martial law could operate before it was declared by civilian authority. His attorneys scanned the skies and the statutes, hemmed a few haws, and changed official course. Within a short time, a new directive stated that military personnel could *not* establish cordons on non-military property, could not seize photographs, could not use physical restraint.

Well, news photography took no giant step forward. We all had a morgue full of wrecked planes and wanted no more. But this message from on high permeated official Washington, and repressive regulations were re-inspected.

NOW we had a runner on first but no reliable umpire to safeguard him. What we needed above all, obviously, was a superlative constitutional lawyer, a new body of laws and court decisions. Our team would never get our man to second. The era of lasting achievement was in sight, but editorial forces alone could never reach it. Please let this go into your FoI records.

The era of lasting achievement was in sight, but editorial forces alone could never reach it. We had to have a commander-in-chief and, for once in military history, he had to be a lawyer.

When ASNE's directors met in New York in October of 1950, I told them the facts. We had to have a commander-in-chief and, for once in military history, he had to be a lawyer. The board agreed, and by pure luck I had a nominee ready. At a Columbia University managing editors' seminar, I had met Harold L. Cross, who lectured on libel and other newspaper afflictions. His style was as superb as his counsel. We had never heard anybody like him.

Cross had retired shortly afterwards to his farm in Maine and I was afraid he was beyond recall. But he readily agreed to meet me in New York, where we talked through an afternoon. I gave him a superfluous briefing on the need for access; when he talked I fell dumb, a rare experience. He knew all the laws used and misused against the public, for whom ostensibly they were passed, and was full of ideas for action. Harold Cross was not wedded to a life of ease. He was a fighter to the bone, ready and well-armed for a battle that looked pretty thankless. We didn't have to send him to training camp, he trained us.

In Harold Cross we got not only a great legal mind but a lawyer with the heart and spirit of a great editor.

We got not only a great legal mind but a lawyer with the heart and spirit of a great editor. He did titanic research in the libraries of Maine, Boston and New York; he typed out with two fingers his working notes and then the manuscript of one of the great books of our time, *The People's Right to Know: Legal Access to Public Records and Procedures*.

One year for a journey through a morass of legal confusion and false trails to a planet of jurisprudence never really explored.

Incredibly, it was just one year later that the ASNE *Bulletin* reported: "All but one chapter is in our hands." One year for a journey through a morass of legal confusion and false trails to a planet of jurisprudence never really explored. And he described it with an ease and lucidity no explorer ever equalled on open land or sea.

Every flag of freedom needs its mottoes, every armor its device. Patrick Henry and Winston Churchill knew it and Harold Cross knew it. For example: "This is not primarily a newspaper problem.

My concern is with the people's right to know—the right of the congressional committee, the individual congressman, the citizen, the taxpayer, the inhabitant, the elector, the student, and all others in a self-governing society; to put it bluntly, last but far from least, the right of Harold L. Cross to know. Without Freedom of Information citizens of a democracy have but changed their kings."

"Without Freedom of Information citizens of a democracy have but changed their kings."—Harold L. Cross

We had now only to follow his footsteps and echo his words. Without him there would be no road map of the hidden wilderness, no explicit manual-of-arms like *The People's Right to Know*. If we got complacent, he promptly stung us with a self-evident caveat: "There is no hope of obtaining inspection of a public record not specifically opened by Congress except by the courtesy of the federal government."

WE TOOK a new look at Congress and many of us felt hope ebbing, but not J. Russell Wiggins, the Washington-wise managing editor of the *Washington Post*. It was Russ who followed me as FoI chairman and showed the difference between a novice and a pro. He advanced and solidified our tentative gains, and he helped us find John Moss, who—like Cross before him—was already converted to our cause.

A later chairman, J. Edward Murray of the *Arizona Republic*, reported: "The hero, main strategist, tactician, passer and ballcarrier in Congress for FoI was the distinguished California representative, John E. Moss."

Moss headed a committee on government operations, and he operated. He was fair-minded, patient, articulate and tough. If he was a rebel within his class, so was George Washington. John assembled a talented staff directed by Sam Archibald, held hearings, wrested confessions from surprised sinners, and made Congress see a light.

Printed reports of hearings began massing like storm clouds—pure sunshine to us. The first report, 76 pages; then 100, then 257. Four volumes on the availability of information or the absence of it came next, and I've no doubt those shelves are growing still.

The team of Moss and Cross was in business. Cross supplied the closely reasoned, unassailable legal logic; Moss the diligent, fearless legislative leadership.

The team of Moss and Cross was in business, and a grateful sigh echoed in the learned halls of ASNE. Cross supplied the closely reasoned, unassailable legal logic; Moss the diligent, fearless legislative leadership.

THE FIRST STATUTORY CASUALTY was old 5 USC 22, a routine custodial statute to safeguard records, long invoked to distort the statutes. Moss outlawed that. Then he looked at the lofty doctrine of executive privilege, proclaimed in the White House and ricocheting to the desk of every self-conceiving executive. Cross really emasculated the concept when he observed at a Moss hearing: "It is difficult to prove that a non-existent thing does not exist." His piece in an

ASNE *Bulletin* on "The Myth of Executive Privilege" will give more laughs than the rerun of a Marx Brothers film.

Then, some ten years later, thanks to Cross and Moss, the central fortress fell. We were still in the shadow of the Administrative Procedure Act. This was news suppression in its crudest form. When Lyndon Johnson signed the Moss amendment to this act, he made probably the most momentous statement of his term: "I sign this measure with a deep sense of pride that the United States is an open society in which the people's right to know is cherished and guarded." Pride never had so many shareholders.

The Administrative Procedure Act was news suppression in its crudest form.

The national scene was bright, but long before, we had realized that news controls in state and local jurisdictions were stifling real democracy. Local politics was dominant and no national group could cope with it.

A fiery red-headed editor named Virgil Newton got a sunshine law passed in Florida, and other states joined the solar society.

In Tampa was a fiery red-headed editor named Virgil Newton, spoiling for a fight. He saved tolls, because if you called to tell him what was needed he hung up and did it. He created Sigma Delta Chi's FoI Committee and state committees grew from this base. He got a sunshine law passed in Florida, and other states joined the solar society. One of Red's signals rode Radio Liberty over the Iron Curtain. Soviet citizens heard they were being hoodwinked.

ABOUT THIS TIME, the nation began to get news through the air, with pictures supplementing radio's words. Very soon FoI committees emerged in the National Association of Radio and Television Broadcasters, the publishers' associations, the Inter-American Press Association—the list kept expanding. Your FoI Center inquired: "Who cares about FoI? Right now some 150 people in 13 national organizations are seeking solutions to our problems."

Before that rhetorical question was asked, we had a busy army and two generals. We still lacked, as chairmen came and went, a base. Everywhere lawyers, judges, businessmen and educators wanted somebody to stand still long enough to answer questions. We needed a highly specialized Library of Congress.

Everywhere lawyers, judges, businessmen and educators wanted somebody to stand still long enough to answer questions.

What we got was not only a sophisticated source of vital information, but also an untiring active partner. The team of Moss and Cross was joined by Earl English and Paul Fisher. If freedom of information ever builds a Hall of Fame, those four will stand first by acclamation.

A recent history of ASNE said: "No offspring of our efforts can compare with the FoI Center at the University of Missouri. Its thoughtful and penetrating publications keep news from the front circulating constantly. Every report treats some vital phase of media responsibility. The Center also publishes a Digest of new laws, speeches, court decisions affecting not only the press but libraries, the stage, book publishing—any field concerned with suppression or censorship."

How lucky freedom of information had been! Here at this great university it had gained another new dimension. The team of

English and Fisher had inspiration, imagination, beyond belief. FoI itself had no free, coordinated flow of information. Your Center was new on this earth, and its publications should be compulsory reading for the United Nations.

The Center's example still spreads. One of your old hands has just established an FoI Clearing House at the University of Florida.

The Center's example still spreads. One of your old hands, Ralph Lowenstein, has just established an FoI Clearing House at the University of Florida. His newsletter is bringing new light to the sunshine state.

I'VE TRIED to give you an honest picture of a stumbling start and of the immortal leaders who really did the job. Others will have to continue the story of the ongoing pursuit of goals far beyond our imagination, especially the current FoI committee's attack on the bill to codify the federal criminal code.

The forces massed to maintain self-governing freedom are formidable. But the instinct for privacy in public officials is imperishable. Last spring, in his report as ASNE chairman, Clayton Kirkpatrick of the *Chicago Tribune* remarked that "The threat to freedom still persists. A new national administration, new leadership in Congress, a new Attorney General and new currents running through the Supreme Court will present challenges to test the committee's ingenuity and resolution."

We early birds were only tinpot Paul Reveres floundering through the dark noisily enough to wake some Minutemen.

I hope none of you will ever forget this. We early birds were only tinpot Paul Reveres floundering through the dark noisily enough to wake some Minutemen. The permanent task of the Freedom of Information Center is to keep them awake.

Samuel J. Archibald

HOW TO UNSCREW THE SYSTEM: PR AND THE FOIA

AT THE BEGINNING of the afternoon sessions of a set of hearings on a bill that eventually became the Freedom of Information Act, a secretary in the basement office of the Foreign Operations and Government Information Subcommittee telephoned the hearing room where Congressman John E. Moss, subcommittee chairman, was presiding.[1]

Neither Moss nor his staff nor the prominent government officials testifying that day had any idea that the telephone call would lead to a legislative compromise which would make the FoI bill a law but would also require its amendment in seven years.

Moss left as soon as he received the call, explaining to the subcommittee member to whom he gave the gavel that House Speaker John McCormick and Majority Leader Carl Albert wanted to see him—urgently. When Moss got back, he called the subcommittee staff to his office—urgently.

Moss told the subcommittee staff that McCormick and Albert had been at a White House strategy meeting with President Lyndon Johnson, and one of the problems discussed was the FoI bill Moss was pushing through Congress.

Moss cleaned up the Johnsonian language in the comments relayed to him by McCormick and Albert: "What the ——— is Moss trying to do, screw me?" they said Johnson had asked his Democratic party leaders in the House. "I thought he was one of our boys, but the Justice Department tells me his goddamn bill will screw the Johnson administration!"[2]

Moss and his staff had been working for 10 years to develop a law to guarantee public access to public records of the federal government.

The message came through loud and clear to Moss and his staff, who had been working for 10 years to develop a law to guarantee public access to public records of the federal government. The Justice Department and its powerful political wing, the Federal Bureau of Investigation, finally had realized that the FoI bill had a good chance of becoming law.

They had convinced President Johnson that a law opening public records to public view endangered their way of life. If President Johnson felt strongly enough about the issue, there would be no FoI Act.

Samuel J. Archibald, a professor of journalism at the University of Colorado, is a former newsman who directed the staff investigations of the Moss committee that developed the 1966 Freedom of Information Act. He also directed the Library of Congress study in 1972 that resulted in amendments to the act.

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THE JOHNSON-McCORMICK-ALBERT MEETING happened a little more than a year after Lyndon Johnson had shouldered the mantle of martyred President John F. Kennedy. Johnson had used the momentum of the tragedy, plus his own Capitol Hill tactics, to translate Kennedy's New Frontier promises into laws.

The Moss group was a subcommittee of the House Government Operations Committee, headed by Congressman William L. Dawson of Chicago's Second Ward. He was the first black congressional committee chairman since the carpetbaggers sent Negro representatives to Congress during Reconstruction. The ideals of equality that Congressman Dawson enunciated in all of his public speeches had been written into reality by President Johnson when he forged the Kennedy program into law.

If President Johnson had merely hinted to Congressman Dawson that he did not want the Moss bill passed, there would have been no Freedom of Information Act.

If President Johnson had merely hinted to Congressman Dawson that he did not want the Moss bill passed, there would have been no Freedom of Information Act. If Dawson had been urged by Johnson to block the Moss bill, he could have done so in many ways; he could, for instance, have refused to call a full committee meeting to consider any bills the subcommittee approved.

In fact, when Dawson's Government Operations Committee was reorganized at the beginning of the 89th Congress, the Moss subcommittee was not reestablished until Moss lobbied other committee members for support and the press published stories that the subcommittee was killed because it had been attacking Johnson administration secrecy.[3]

The eventual compromise was that the Senate version of the FoI Act would be accepted in the House, and the Justice Department lawyers could help write the House report on the new law.

Following the discussion of the facts of political life that the president's comments implied, Moss and his subcommittee staff began work on a compromise between the best possible Freedom of Information Act and no law at all. The eventual compromise was that the Senate version of the FoI Act would be accepted in the House, and the Justice Department lawyers could help write the House report on the new law.

That compromise probably marked the high point of the public relations program that developed the Freedom of Information Act as it exists today. The program began in the spring of 1955, when the Democrats came back into power in the House of Representatives. After Dwight David Eisenhower had finally decided he was a Republican in 1952 and had been persuaded to run for president, he had carried the House and Senate with him. For the first two years of the Eisenhower administration, the House had been controlled by Republicans, but in 1954 the voters selected a majority of Democratic representatives. The Democratic leaders were trying to figure out how to act when they controlled the House on Capitol Hill while the Republican Party controlled the White House downtown.

Chairman Dawson asked the other members of his House Government Operations Committee for suggestions, and John Moss suggested a study of the whole area of availability of information.[4] Moss had no experience in the information business, but he had had one brush with government secrecy in his two years in Washington. When the 84th Congress with its newly Democratic

House began, Moss was beginning his third year as a representative of California's 3rd Congressional District, which included the state capital in Sacramento and the rich farm counties to the north. He had served little more than a year on the House Government Operations Committee, switching over from the Post Office and Civil Service Committee in the middle of his first term after he had made a political issue with his party leaders of his need for an assignment better than the Civil Service Committee, which then served as the city council for Washington, D.C. In his brief time on the House Civil Service Committee, Moss also had experienced the federal government's numbers game.

WHEN THE REPUBLICANS took over the U.S. Civil Service Commission after the Eisenhower election, they began to make good on their campaign promise to kick the Communists out of government jobs. But they couldn't find anywhere near the number of Communists that their campaign literature had said were holding civil service jobs.

So the Republicans began firing unsuitables—alcoholics, homosexuals and incompetents—and identifying them as Communists cleaned out of the federal government. Moss served as the most junior member of the House Post Office and Civil Service Committee when the chairman of the U.S. Civil Service Commission came to Capitol Hill to explain his "former Communists in government" figure. Moss' driving, insistent questions helped expose the phony figures the Eisenhower administration was using to claim that a huge number of Communists had been cleaned out.

Moss initially was bothered more by Civil Service Commission officials and other executive branch witnesses refusing to give Congress information than he was by any freedom of information problems the press was having.

That experience interested Moss in government information problems, although he was bothered more by Civil Service Commission officials and other executive branch witnesses refusing to give Congress information than he was by any freedom of information problems the press was having.

Dawson assigned the Moss suggestion for an information study to Wallace Parks, a House Government Operations Committee staff member with law and political science degrees, who wrote a background memorandum suggesting the committee ought to take advantage of the anti-secrecy agitation by the press.

Anti-secrecy agitation by the press was largely the fault of James Pope of the Louisville Courier-Journal.

That agitation was largely the fault of James Pope of the *Louisville Courier-Journal*, chairman of the Freedom of Information Committee of the American Society of Newspaper Editors, who was aided by two other committee members, J. Russell Wiggins of the *Washington Post* and Herbert Brucker of the *Hartford Courant*.

Pope's FoI Committee had convinced the society of editors to hire Harold L. Cross to find out the true status of freedom of information in the United States.

Cross, a major partner in a New York law firm, was legal advisor to the *New York Herald Tribune* and also was a lecturer in law at the Columbia University Graduate School of Journalism. He accepted the ASNE challenge—the pay, he later admitted, was far

below the fee any lawyer would charge, let alone a New York lawyer who was a specialist in press law—and the result was *The People's Right to Know,* published in 1953.[5]

FOR THE FIRST TIME, the press had the facts about government secrecy—how bureaucrats at federal, state and local levels hid the facts of government and what laws they relied on for the secrecy. The Parks memorandum suggested the House Government Operations Committee ought to capitalize on the anti-secrecy agitation by investigating the details in the Cross book applying to the federal government.

Dawson liked the idea. McCormick liked the idea. Their House Government Operations Committee had the power to investigate the efficiency and economy of executive branch operations at all levels. Certainly, the efficiency and economy of a government based on secrecy was highly questionable.[6]

The public relations program began to convince the press, the public and the Congress that there was a "paper curtain" hiding the facts of government.

Dawson offered chairmanship of a subcommittee on government information to John Moss, and the public relations program began to convince the press, the public and the Congress that there was a "paper curtain" hiding the facts of government. The first move was a formal letter from Dawson to Moss chartering a Special Subcommittee on Government Information, since Moss did not have enough seniority to head a regular subcommittee. The letter was drafted by a former newsman in Moss' congressional office, approved by Moss, checked by Dawson's committee staff and formally transmitted to Moss on June 9, 1955.

One paragraph of that charter letter sounded the battle call to tear down the walls of government secrecy, and it set the tone for the 10-year investigation:

The letter from Dawson to Moss sounded the battle call: "An informed public makes the difference between mob rule and democratic government."

"An informed public makes the difference between mob rule and democratic government. If the pertinent and necessary information on governmental activities is denied the public, the result is a weakening of the democratic process and the ultimate atrophy of our form of government."[7]

The charter letter appointed Moss and Dante B. Fascell, a Miami Democrat in his first term in Congress, as two of the Government Information Subcommittee members. Clare Hoffmann, the senior Republican member of the House Government Operations Committee, appointed himself as the third subcommittee member.

Moss and his new subcommittee staff, composed of three former newsmen and Wally Parks, published in the *Congressional Record* an analysis of the federal government secrecy problem.[8] It promised a slow and careful study, and it asked for guidance from the press. It coined the phrase "paper curtain" applying to government secrecy, but it included one major error that neither the press nor the government sleuths ever discovered.

THE WORDS "paper curtain" became the catch phrase of re-

porters and editorial writers commenting on the dangers of government secrecy. Often the editorial writers picked up an example of silly government secrecy which was included in the "paper curtain" excerpt.

It was reported that the Defense Department had classified as a military secret the amount of peanut butter purchased for the armed forces.

That was the report that the Defense Department had classified as a military secret the amount of peanut butter purchased for the armed forces. The reason for the secrecy, according to the report, was that clever experts on the "other side" could divide the peanut butter purchases by the average U.S. peanut butter consumption and come up with the total strength of U.S. armed forces.

But, the "paper curtain" report stated, the peanut butter purchases that were classified by the military were reported regularly in government commodity purchasing lists disseminated by the Department of Commerce.

A beautiful example of silly government secrecy that has been used in thousands of stories ridiculing the military classifiers. But it is not true.

Soon after the peanut butter story appeared in the "paper curtain" excerpt from the *Congressional Record*, somebody questioned its validity. One of the Moss committee staff members said he got the story from a friend at the National Press Club bar. The friend, it turned out, had the story from a *Redbook* magazine article of a few years earlier. The article was resurrected, the author was interviewed, his source was checked--and the whole peanut butter secrecy story turned out to be false.

A public relations decision was made on the staff level: Forget the whole thing, for a correction would never catch up with the error. But in the future, check every bit of information before it goes out as an official Moss committee pronouncement.

One other early mistake could have been made, but it was avoided, and thus helped set the tone of the investigation that was to result in the Freedom of Information Act.

Soon after he was named subcommittee chairman, Moss was invited to dinner at the Maryland farm of Drew Pearson. The muckraking columnist who started the "Washington Merry-Go-Round" column, now written by Jack Anderson, told Moss how he could tear through the paper curtain in Washington. First, Pearson suggested, get the subcommittee staff cleared for access to classified documents. Then get batches of documents from the Pentagon and the State Department and have the staff analyze them. They would find enough examples of improperly classified documents, Pearson assured Moss, to justify dozens of major news stories.

Moss and his staff decided on a slow, careful study of the problems of government information as the groundwork for a public relations program which would convince the Congress, the press and the public that there ought to be a law to break the government secrecy barrier.

When Moss had thus made a name for himself, Pearson said, he could work on the problems of routine government secrecy and on the claim of a so-called executive privilege used by the White House to withhold information from Congress.

Moss discussed Pearson's recommendations with his staff and rejected them. Instead, they decided on a slow, careful study of the problems of government information as the groundwork for a public relations program which would convince the Congress, the press and the public that there ought to be a law to break the government

secrecy barrier.

The first step was a survey of government agencies' information practices.

The first step was a survey of government agencies' information practices—what kind of information did they give the public, what was withheld and what legal authority did they claim for the withholding? All government agencies in the executive branch answered the detailed information questionnaire, and their answers were compiled in an inch-thick committee print that became the bible for the early investigations.[9]

Staff members combed through the agency answers, finding all the agencies that seemed to lack open-door policies or had questionable authority for their secrecy practices. Top officials of those agencies were interviewed by the staff members and, when the answers indicated a less-than-friendly attitude toward the people's right to know, the agency was flagged for a future hearing.

After opening hearings giving information leaders a chance to explain the need for an informed people in a democratic society, the Moss committee held hearings for those agencies that had been highlighted by the staff interviews. And the results proved that the Moss committee had been right to reject the razzmatazz recommendations of Drew Pearson.

THE INITIAL HEARINGS covered routine agencies such as the Civil Service Commission and the Agriculture Department.[10] There were some interesting developments. For instance, the chairman of the Civil Service Commission said the government would disclose the names and salaries of federal employees only to a responsible reporter who wanted the information for a reasonable purpose. The government, he said, could decide which reporters were "responsible" and which of their purposes were "reasonable."[11]

Later hearings disclosed similar "it's none of your damned business" attitudes among the federal agencies. Some of the examples made dramatic news stories, but most dramatic was the huge volume of day-to-day government secrecy that had created the paper curtain in Washington. There were, as Drew Pearson had predicted, plenty of military and state secrets that did not qualify for the secrecy stamp, but there were many more routine administrative secrets that were hidden from the people, who are supposed to make the final decisions in a democratic society.

There were plenty of military and state secrets that did not qualify for the secrecy stamp, but there were many more routine administrative secrets that were hidden from the people, who are supposed to make the final decisions in a democratic society.

All of the examples of silly government secrecy were used by the Moss committee to emphasize the government's negative attitude toward the people's right to know the facts of government. In public hearings or in letters to government agencies, the Moss committee highlighted absurd government secrecy.

For instance, the Agriculture Department refused to identify cattle companies that had been granted permits to graze their cattle on public lands.[12] The General Services Administration refused to make public the rent paid for a routine government office building in Philadelphia,[13] and the same agency decided photographs could not be taken in federal buildings without the permission of the

building janitor.[14]

The Moss committee disclosed that the Pentagon had stamped "secret" on the bow and arrow and had also classified the fact that water runs downhill.

The military, of course, was a prime target. The Moss committee disclosed that the Pentagon had stamped "secret" on the bow and arrow[15] and had also classified the fact that water runs downhill.[16] Military secrecy even shrouded the list of military bases in the United States where soldiers could buy liquor by the bottle.[17]

While all of these examples of silly government secrecy were publicized, the Moss committee staff worked carefully on a possible freedom of information law to solve the secrecy problems.

This work was guided by Harold L. Cross, whose book had pinpointed the legal authorities claimed for secrecy, and by Jacob Sher, a Northwestern University journalism professor who was a lawyer, a newspaperman and a teacher for generations of reporters and for the Moss committee members and staff.

Jake Sher came up with a simple solution to the government secrecy problem—a bill stating simply that federal agencies must make all records of official action available to the public. The problem was to define "official action."

Jake Sher came up with a simple solution to the government secrecy problem—a bill stating simply that federal agencies must make all records of official action available to the public. The problem was to define "official action." As various definitions were added to bills introduced in the House and Senate, Jake Sher's simple solution became the thousand-word law that was the first Freedom of Information Act.[18]

Both Jake Sher and Harold Cross died before their ideas were cast into legislation and the tactics were perfected to make the Freedom of Information Act possible.

ON THE SENATE SIDE, FoI matters were handled by a subcommittee of the Judiciary Committee. The first Senate subcommittee chairman was Thomas C. Hennings Jr. of Missouri, who was deeply interested in the subject because the leading school of journalism in his state had opened a Freedom of Information Center. When Senator Edward V. Long replaced Hennings, he continued the Missouri interest in the people's right to know, and most of the effective Senate work was directed by his chief subcommittee counsel, Bernard Fensterwald Jr.

A legislative pattern developed. The House and Senate staffers would draft FoI bills that would be introduced on both sides of the Congress. They were based on the public information section of the 1946 Administrative Procedure Act, which had become the major legal excuse federal agencies relied upon for withholding public records.

The bills would be referred to the Judiciary Committees in the House and the Senate, since these committees had legislative authority over the Administrative Procedure Act. In the Senate, the subcommittee of the Judiciary Committee headed by Hennings, and later Long, would hold hearings on the bill, push it through the committee and through the Senate. The Senate-passed bill would then go to the House and be referred to the Judiciary Committee, to which similar bills introduced in the House had been referred.

Nothing happened. The FoI bills, introduced each year in the

House by Moss and a growing number of members of both political parties, were referred to the House Judiciary Committee and died there without hearings. The Senate-passed bills had the same quiet death.

There seemed to be no way to solve the problem. In 1958, Moss had introduced a bill to solve one of the major government secrecy problems, and it had become law.[19] Until that time, government agencies had relied for their legal secrecy powers on the so-called "housekeeping law" adopted by the First Congress to give department heads the authority to establish rules to protect the property and papers of their departments.

The first Freedom of Information Act pushed through Congress by Moss had added a single sentence to the 189-year-old "housekeeping law."

The book by Harold Cross had pointed out that the authority to keep files had been twisted into a claim of authority to keep those files hidden from the public. The first Freedom of Information Act pushed through Congress by Moss had added a single sentence to the 189-year-old housekeeping law: "This section does not authorize withholding information from the public or limiting the availability of records to the public."

The 1946 Administrative Procedure Act stated that all public records were open for inspection unless, for good cause found, the records were held confidential in the public interest.

When that claim of authority for secrecy was removed, federal agencies fell back on the 1946 Administrative Procedure Act, which stated that all public records were open for inspection unless, for good cause found, the records were held confidential in the public interest.[20] Any secrecy-minded bureaucrat could, of course, find good cause, in the public interest, to withhold records that might make it difficult for his agency to carry out its appointed tasks.

Obviously, the 1946 Administrative Procedure Act had to be amended, but just as obviously, it was not going to happen as long as the House Judiciary Committee handled the legislation.

MOSS found a solution. Again, FoI bills were introduced in the House and Senate, but there was one subtle difference. The Senate bill amended the Administrative Procedure Act, but the House bill—identical in all other respects—amended the section of the United States Code that had evolved from the old housekeeping law.

That law was legitimately within the authority of the House Government Operations Committee. After all, the anti-secrecy amendment to the housekeeping law had been handled by the committee, through the subcommittee headed by Moss. So this time the newest FoI bill was referred to the Moss committee instead of the House Judiciary Committee.

Moss probably had to trade a pound of flesh to Emanuel Celler, chairman of the House Judiciary Committee, for the agreement to send his FoI bill—and any similar legislation passed by the Senate—to the House Government Operations Committee. He never told his staff what concessions he had to make following his conference with Celler, House Parliamentarian Lewis Deschler and Speaker John McCormick.

Nevertheless, Moss got what he wanted. He got the right to

handle the FoI bills that he and other House members had introduced to amend the Administrative Procedure Act, and he got the right to handle similar legislation passed by the Senate. The White House, the Justice Department, the Pentagon and the State Department never caught on until it was too late. They were prepared for the legislative pattern of past years—passage of an FoI bill in the Senate, death in the House.

The White House, the Justice Department, the Pentagon and the State Department never caught on until it was too late. They were prepared for the legislative pattern of past years.

The bureaucracy went along with the Senate bill, which had undergone some minor changes in the Senate and was not the world's best piece of legislative draftsmanship. When it was drafted and introduced, House staffers had planned to perfect the bill with amendments after it had passed the Senate.

But, Moss and his staff decided, there would be no changes in the House. If the bill had been opened for perfecting amendments—either in the subcommittee, the full committee or on the House floor—the executive branch of the federal government, which finally realized it had been had, would have forced so many self-serving amendments that the bill would have had to be killed by its sponsors as an act of mercy.

So a rather weak and complicated piece of legislation passed by the Senate became law without improving amendments in the House. And, under the implicit agreement with the White House, the Freedom of Information Act was weakened even further when Justice Department lawyers participated in drafting the House report explaining the legislation.

Secrecy-minded executive branch officials could take two more swings at the FoI bill to weaken it a little more. The Department of Justice wrote a memorandum explaining to all other agencies how they were to interpret and administer the new law.[21] And all government agencies had to adopt regulations applying the Freedom of Information Act to their particular operations.

Each and every one of the government agencies adamantly opposed any law guaranteeing the right to know.

During years of congressional testimony, every executive branch agency had come out, forthright and foursquare, for the people's right to know in a democratic society. But each and every one of the government agencies had adamantly opposed any law guaranteeing the right to know.

No one would expect federal agencies that had opposed a Freedom of Information Act to adopt regulations which would make the new law work. They didn't. A weak and complicated law, weakened further by the Justice Department emasculation of the House report, was further weakened by the department's memorandum explaining the law and weakened still further by agency regulations implementing it.

The Freedom of Information Act that became effective on July 4, 1967, was used primarily by private interests to get public reports for personal gain.

THE FREEDOM OF INFORMATION ACT that became effective on July 4, 1967, was a difficult law to use. But it was an effective law if properly used. It was the result of an 11-year public relations program educating most of the press and the Congress and much of the public on the dangers of government secrecy. It was a result of

the legislative process—that is, it was a compromise.

And the Freedom of Information Act was used primarily by private interests to get public reports for personal gain.

During the first four years that the law was in operation, private corporations and their expensive law firms used it 640 times, the press used it 90 times and public interest groups used it 85 times.[22]

So what else is new? The democratic system permits the clash of private interests—an individual voting for a candidate of the same ethnic, religious and political background, or a corporation supporting government regulations that are most advantageous to its stockholders—and the system permits the balancing of those interests in the hope that the greatest general good will prevail.

Minimal press use of the new Freedom of Information Act is understandable, even though it had become law with the support of the more articulate members of the information industry who really believed in their First Amendment duties to inform the public. To sell its information product, the press has to get information fast and must disseminate it before a competitor does. There were three problems the press had with the Freedom of Information Act.

There were three problems the press had with the Freedom of Information Act.

First, it was not an information law. It did not provide information from the federal government. It did not require an agency to develop facts or answer questions; it merely required the agency to give the press and the public records of its official actions. The great majority of the daily news stories are based on what some official says has happened or will happen, not upon a careful searching of the public records.

Second, it did not require federal officials to meet press deadlines. Even if a reporter wanted to use public records for a story, the law did not require federal agencies to provide records in a timely manner.

Third, reporters who pushed and demanded and, finally, got access to public records might be given those records only after they had been passed out to the competition. The law was for the public's right to know, not the right of the press to get exclusive stories. Federal officials could rationalize retaliation against demanding reporters by claiming they had to make the records available to all members of the public, and it wasn't their fault the records happened to be distributed on the competition's time schedule.

EVEN WITH MANY of the powers of secrecy still on their side in spite of the Freedom of Information Act, federal agencies developed new techniques for hiding public records. They did so largely because the more the law was used, the more effective it became as a tool to dig out the facts of government.

Federal agencies developed new techniques for hiding public records; among them, secrecy by delay and secrecy by dollars. When all else failed, federal agencies forced insistent applicants for public records to go to court.

A study of the first four years of operation under the Freedom of Information Act shows that very few of the initial refusals of access to public records were appealed. Although the original law did not require federal agencies to set up internal systems requiring high level officials to act on appeals when a government clerk initially

refused to give out a public record, nearly all agencies did establish an administrative appeals system.

In only 16 percent of the cases studied in the first four years of the Freedom of Information Act's operation were the initial refusals appealed. But when a citizen did insist on the right to know and appealed the initial refusal to the head of the agency, all or part of the public records were made available nearly 26 percent of the time.[23]

The court enforcement provision may well have been the most important part of the original Freedom of Information Act, for it required government agencies to prove in court that secrecy was necessary.

A few final agency refusals were appealed to the courts. The court enforcement provision may well have been the most important part of the original Freedom of Information Act, for it required government agencies to prove in court that secrecy was necessary. The effectiveness of this sanction is indicated by the fact that, when there was a court decision on an FoI case, the petitioners got all or part of what they wanted from the government in 58 percent of the cases.[24]

In spite of legislative compromise and executive branch foot dragging, the progression from 16 percent to 26 percent to 58 percent showed the original Freedom of Information Act was becoming a valuable tool to dig out the facts of government. So the federal agencies adopted their own administrative amendments.

They developed secrecy by delay. They took an average of 33 days to answer an initial request for access to a public record.[25] They developed secrecy by dollars, charging way above government costs for copying public records.

The federal agencies used the investigatory files gimmick as a major shield of secrecy.

The federal agencies used the investigatory files gimmick as a major shield of secrecy. The original Freedom of Information Act included nine categories of public records that might be exempt from public disclosure. One category was investigatory files compiled for law enforcement purposes. Federal agencies often claimed their public records were investigatory files, even though the investigation had been completed long ago.[26]

When all else failed, federal agencies forced insistent applicants for public records to go to court. It was easy to get a case into court, for the law required federal district courts to give FoI cases expeditious handling. But court action was expensive, and agencies knew public records applicants would be likely to back away from their demands for documents rather than go to court.

BY THE TIME the Freedom of Information Act had been in operation long enough to determine how well—or how poorly—it was working, Congressman John E. Moss no longer was chairman of the congressional subcommittee that had made the freedom of information concept a federal law. He headed another major congressional investigating unit, and the Moss committee was taken over by William L. Moorhead, a rich Pittsburgh Democrat who had many political and social interests.

Moorhead followed the Moss lead, moving toward amendment of the Freedom of Information Act with a careful staff study of administration of the law. By 1972, when the study was completed

by a special Library of Congress task force, the Missouri senators who had been the titular freedom of information leaders in the upper house were replaced by Senator Edward Kennedy, D-Mass., who took a strong interest in the FoI problem.

The House and Senate subcommittees held hearings based on the Library of Congress study and came up with amendments to make the Freedom of Information Act more effective.

The amendments abolished the federal agencies' secrecy-by-delay tactics, requiring them to answer all initial requests for public records within 10 days, to answer all administrative appeals within 20 days and to take an extra 10 days only in extreme cases.[27]

The amendments abolished the federal agencies' system of secrecy by dollars, permitting them to charge only the actual government cost for searching and copying public records and requiring the agencies to provide copies free of charge if the general public would benefit.[28]

The amendments limited to six specific types the investigatory files that could be withheld,[29] and the amendments made it less costly to go to court to enforce the right to know by permitting the courts to charge court costs and attorneys' fees to the government agency that lost its FoI case.[30]

But most important among more than a dozen other amendments to improve the Freedom of Information Act was the Ralph Nader Memorial Amendment proposed by the Public Citizen himself, and pushed through by Senator Kennedy.

For the first time since the housekeeping law was adopted by the First Congress in 1789, federal law included possible punishment of federal employees who hid public records from the public.

For the first time since the housekeeping law was adopted by the First Congress in 1789, federal law included possible punishment of federal employees who hid public records from the public, even though the anti-secrecy sanction finally adopted by the Congress was much weaker than the original Nader-Kennedy proposal. It permitted a court to direct the U.S. Civil Service Commission to order disciplinary action against any federal employee who arbitrarily and capriciously withheld public records.[31]

The sometimes conflicting amendments to the Freedom of Information Act developed by the subcommittees headed by Representative Moorhead and Senator Kennedy were being worked out in a conference committee when Richard M. Nixon decided the better part of valor was retirement to San Clemente, and he appointed Gerald R. Ford as his president. Ford asked his former congressional colleagues for time to think over the FoI amendments they planned to send him and, as a result of his suggestions, they made a few changes in the proposals.[32]

Once more the press and the Congress cooperated on the same sort of public relations program that had pushed through the first Freedom of Information Act. Congress overwhelmingly rejected Ford's veto, and the amended Freedom of Information Act became law.

But that was not enough. When Congress passed the amendments, President Nixon's president vetoed them.[33] Once more the press and the Congress cooperated on the same sort of public relations program that had pushed through the first Freedom of Information Act. Congress overwhelmingly rejected Ford's veto, and the amended Freedom of Information Act became law.[34]

There are some indications that, after 11 years of initial development of the freedom of information idea, information may not be completely free but it is much more reasonable.

IS IT WORKING any better than before? It will take another major congressional study to find out, but there are some indications that, after 11 years of initial development of the freedom of information idea, after eight and one-half years of experience with the original law and after nearly four years of experience under the amended law, information may not be completely free but it is much more reasonable.

One indication is the massive publicity program Federal Bureau of Investigation press agents have mounted to complain that the agency must spend agents' time resurrecting files of past peccadilloes instead of catching John Dillinger.[35] Another indication is a comparison of the Library of Congress study that resulted in the Freedom of Information Act amendments to the administration of the law after the amendments.

One amendment required each federal agency to file with the Congress an annual report on its stewardship of the people's right to know.[36] Comparison of the 1976 report with the Library of Congress study covering July 1967 through July 1971 indicates how false were President Ford's fears that the republic would crumble because of the FoI amendments.

Comparison of the 1976 report with the Library of Congress study covering July 1967 through July 1971 indicates how false were President Ford's fears that the republic would crumble because of the FoI amendments.

A major reason for his veto, Ford said, was his fear that the proposed law placed an unreasonable limit on the amount of time an agency could take replying to a Freedom of Information request.[37] The Library of Congress study indicates it took federal agencies, under the original law, an average of 70 days to answer requests for public records. The amendments cut that to 10 days for an initial request, 20 days for an appeal and an additional 10 days under special circumstances.[38] In 1976, in spite of the fears of Ford and the fulminations of the FBI, the average time to answer the hard Freedom of Information demands—those requests appealed to the head of the agency after an initial denial—was 10 and one-half days.[39]

The Library of Congress study indicates that all or part of a public record was made available under the original Freedom of Information Act 25 percent of the time. The 1976 reports indicate the agencies made all or part of the documents available 59 percent of the time.[40]

The Library of Congress study shows that, of the nine categories of public records that could be withheld, the federal agencies relied most upon category four permitting withholding of so-called trade secrets and category five permitting withholding of internal memoranda.[41] But, the study showed, the government lost more of the court cases testing these exemptions than it won.[42]

The 1976 report indicates that federal agencies had backed off of the trade secrets and internal memoranda exemptions. Instead, the most used exemption was number seven—the investigatory files category that Congress had amended to make it more specific.[43]

Finally, a comparison between the 1976 agency reports and the Library of Congress study shows that only five percent of the refusals of access were appealed in 1976 compared to 16 percent appealed in the early years.[44]

The freedom of information public relations program that began in 1955 to educate the Congress, the press and the public was very successful as far as Congress is concerned. But the press and the public–the supposed beneficiaries of the legislation–aren't making much use of the law.

WHAT—in addition to the need for another full congressional study—does it all mean? It means that the freedom of information public relations program that began in 1955 to educate the Congress, the press and the public was very successful as far as Congress is concerned. But the press and the public—the supposed beneficiaries of the legislation—aren't making much use of the law.

The number of requests for access to public records probably has increased, but effective use of the Freedom of Information Act certainly has not increased, since 16 percent of the initial refusals were appealed in 1967-1971, but only five percent were appealed after it was amended.

The partial comparison of pre-amendment to post-amendment administration of the law also means that many agency complaints about the difficulties of honoring the people's right to know are largely bureaucratic bitching.

The strict time limits mandated by the amendments apparently have been met with ease. If the average time taken to answer demands for records is 10 and one-half days, when a case could take a maximum of 30 days, federal agencies do not seem harassed by the need for speed.

Somewhere, deep within the memory bank of each federal agency, is some sort of mechanism that tells the bureaucrats how to keep ahead of the lawmakers.

Finally, the analysis shows what observers of the Washington bureaucracy have known for a long time. Somewhere, deep within the memory bank of each federal agency, is some sort of mechanism that tells the bureaucrats how to keep ahead of the lawmakers.

The agencies were losing court cases based on the trade secrets and internal memoranda exemptions of the Freedom of Information Act. They did not admit the use of those exemptions was wrong, but they stopped using them, nevertheless.

Meanwhile, back on Capitol Hill the Congress made the investigatory files exemption more specific, and the bureaucratic memory bank sensed that the agencies should claim that exemption instead of the ineffective trade secrets and internal memoranda exemptions.

So the agencies raise new barriers against the slings and arrows of freedom of information. Possibly a complete congressional study of the effectiveness of the amended Freedom of Information Act will show ways to breach the new barriers.

Footnotes:

1. U.S., Congress, House, Committee on Government Operations, *Hearings Before a Subcommittee of the Committee on Government Operations*. 89th Cong., 1st sess., 1965, pp. 35-50.

2. A bowdlerized version is included in Bruce Ladd, *Crisis in Credibility* (New York: New American Library, 1968), pp. 205-6.

3. *Ibid.*, pp. 188–213; see also Paul R. Wieck, "Chill Threatens Press Bill," *Albuquerque Journal*, 11 July 1965.

4. Telephone discussion between the author and Moss, 16 February 1978.

5. Harold L. Cross, *The People's Right to Know* (New York: Columbia University Press, 1953).

6. The fact that the investigation was based in a congressional committee that had authority to investigate only the executive branch—not the judicial or the legislative branch—indicates why the Freedom of Information Act does not cover the Congress. Some apologists argue that Congress was exempted from the law because only the Congress has constitutional authority to impose secrecy (Art. I, sec. 5: "Each House shall keep a Journal of its Proceedings, and from time to time publish the same, excepting such Parts as in their Judgment shall require Secrecy."). The fact is that the government secrecy investigation started in a Democratic committee that had authority to investigate only the Republican executive branch; anyway, if FoI legislation had proposed control of congressional information, it would never have been passed by a Congress controlled by either political party.

7. U.S., Congress, House, Committee on Government Operations, *Hearings Before a Subcommittee of the Committee on Government Operations*. 84th Cong., 1st sess., 7 November 1955, pp. 2-3.

8. U.S., Congress, House, Rep. John E. Moss, "Is There a Paper Curtain in Washington?" 84th Cong., 1st sess., 2 August 1955, *Congressional Record*, pp. 13246-48.

9. U.S., Congress, House, Committee on Government Operations, *Replies from Federal Agencies to Questionnaire Submitted by the Special Subcommittee on Government Information of the Committee on Government Operations*, Committee Print. 84th Cong., 1st sess., 1 November 1955.

10. *Hearings*, 84th Cong., 1st sess., 8, 9, 10 November 1955.

11. *Ibid.*, pp. 106-7.

12. U.S., Congress, House, *Availability of Information from Federal Departments and Agencies (First 5 Years and Progress of Study, Aug. 1959-July 1960)*, H.R. 2084, 86th Cong., 2d sess., 1960, pp. 46-47.

13. U.S., Congress, House, *Availability of Information from Federal Departments and Agencies (Progress of Study, Feb. 1957-July 1958)*, H.R. 2578, 85th Cong., 2d sess., 1958, p. 80.

14. *Ibid.*, p. 71; see also U.S., Congress, House, *Availability of Information from Federal Departments and Agencies (Progress of Study, July-Dec. 1956)*, H.R. 157, 85th Cong., 1st sess., 1957, p. 7.

15. U.S., Congress, House, *Availability of Information from Federal Departments and Agencies (Department of Defense)*, H.R. 1884, 85th Cong., 2d sess., 1958, p. 10.

16. H.R. 2084, pp. 81-83.

17. H.R. 1884, p. 5.

18. 5 U.S.C. 552.

19. Public Law 85-619 amending Revised Statutes sec. 161.

20. U.S., Congress, House, Committee on Government Operations, *Clarifying and Protecting Right of the Public to Information*, H.R. 1497 to Accompany S. 1160, 89th Cong., 2d sess., 1966, p. 4.

21. U.S., Department of Justice, *Attorney General's Memorandum on the Public Information Section of the Administrative Procedure Act*, June 1967.

22. U.S., Congress, House, Committee on Government Operations, *Hearings Before a Subcommittee of the Committee on Government Operations*. 92nd Cong., 2d sess., 6, 10, 14, 17 March 1972, p. 1341.

23. *Ibid.*, p. 1339.

24. *Ibid.*, pp. 1339-40.

25. *Ibid.*, p. 1341.

26. *Ibid.*, p. 1342.

27. 5 U.S.C. 552 (a) (6) (A) and (B).

28. 5 U.S.C. 552 (a) (4) (A).

29. 5 U.S.C. 552 (b) (7).

30. 5 U.S.C. 552 (a) (4) (E).

31. 5 U.S.C. 552 (a) (4) (F).

32. U.S., President, *Public Papers of the Presidents of the United States* (Washington, D.C.: Office of the *Federal Register*, National Archives and Records Service),

Gerald R. Ford, 1974, pp. 1061-62.

33. *Ibid.*, pp. 374-76.

34. Public Law 93-502.

35. "500 FBI Agents Chasing Papers," *Boulder Daily Camera*, 17 July 1977; see also "Information Act: Years of Foot Dragging Not Ended," *Washington Post*, 26 June 1976.

36. 5 U.S.C. 552 (d).

37. *Public Papers of the Presidents*, p. 375.

38. 5 U.S.C. 552 (a) (6) (A) and (B).

39. Based on an analysis of the executive branch reports to Congress on administration of the FoI Act in 1976 compared to the Library of Congress analysis of the first four years of administration of 5 U.S.C. 552. The only agencies compared are those existing in 1976 in substantially the same form as in the 1967-71 period covered by the Library of Congress study cited in footnotes 22 through 26. A report based on the comparison is in rough draft, and a final comparative report is to be presented to the Government Information and Individual Rights Subcommittee of the House Government Operations Committee, which provided copies of the 1976 reports to make the comparison possible.

40. *Ibid.*

41. *Hearings*, 92nd Cong., 2d sess., 6, 10, 14, 17 March 1972, p. 1343.

42. *Ibid.*, p. 1346.

43. See footnote 39.

44. *Ibid.*

Richard S. Salant

FREEDOM FOR WHAT?

The Harold L. Cross Memorial Lecture

FOR ME, this is as delightfully flattering as it is pleasantly overwhelming. In general, publishers and editors are not intended to be honored but to be Dear-Sir, you-curred—or, until more recent days, horsewhipped. I have a cartoon on my office wall showing an obviously belligerent gentleman, his chin thrust out, glaring down at the receptionist outside the door of the editor of the *Daily Gazette;* the shrinking receptionist says, "And just what did you wish to punch him in the nose in reference to?" Paranoid that I am, it seems to me that cartoon is particularly apropos for those of us in management of broadcast journalism: We seem to qualify for the *Guinness Book of World Records* for *never* being right.

And so it is especially refreshing, surprising and welcome to have a pat on the back—particularly so honorable a pat—instead of a punch in the nose. I'll just enjoy it, inhale it, and leave it to others to decide which of these—pat or punch—alternatives I really deserve. In fact, I'll settle for one of each; in our line of business, like Reggie Jackson's, batting 500 is pretty good.

In Columbia, Missouri, the transcendent issues of freedom of information have had more continuous and systematic examination than anywhere else.

I particularly appreciate the opportunity to be here in Columbia—the home of the University of Missouri School of Journalism and the place where the transcendent issues of freedom of information have had more continuous and systematic examination than anywhere else. And too, it is the place where Elmer Lower, that admirable and effective champion of freedom of information, will soon return home to carry on the important crusade on which a robust democracy itself depends. I envy Elmer's future students.

IT IS FITTING that in observance of the 20th anniversary of the Freedom of Information Center here, this Journalism Week has focused on important current questions relating to the free flow of information and the Freedom of Information Act, for which we owe so much to this Center and Congressman John Moss.

Richard S. Salant has been president of CBS News since February 1966, having previously held the post from 1961-1964. He is a graduate of Harvard Law School and a member of the National News Council.

As those who are connected with the Freedom of Information Center know so well, the work is never done; important new questions continue to emerge, while old questions remain still unresolved.

In this country, the Freedom of Information Act is more often evaded than honored by government officials and agencies. There

are more clouds than sunshine in the implementation of sunshine laws. The imperative need for protection of confidentiality and of sources is largely unfulfilled—by court-created confusion, if nothing else. The new and critical issue of the right of a libel case plaintiff who is a public figure to demand testimony from journalists to explore their states of mind, their reasons for pursuing some leads and not others, for believing some people and not others, is now before the Supreme Court in the Colonel Herbert suit against CBS, Mike Wallace and producer Barry Lando. So, a year from now, we might be confronted by the unhappy fact—or decision—that the *Sullivan* case, which so many of us hailed as an important advance on the issues of free flow of information and a free press, may be a classic Pyrrhic victory. The Herbert case, a decade later, may establish that the landmark *Sullivan* decision has exacted a price for press protection which is exorbitant.

Regrettably, it is not only in the United States that there are freedom of information battles still to be fought and won.

Regrettably, it is not only in the United States that there are freedom of information battles still to be fought and won. It is well to comfort ourselves with the knowledge that while here in this country our bottle may be 10 or 20 percent empty, that at least means it is 80 or 90 percent full. Elsewhere, in so many places around this globe, the bottle is entirely empty. For there are devastating restrictions on the free flow of information that exist, and more that are seriously threatened, abroad.

A decade ago a group of journalists and scholars devised criteria to measure freedom of the press: They called it PICA—Press Independence and Critical Ability. Their work was reported here at the Center. In 1966, they concluded that "a plurality of the world's nations and the world's population lives under conditions of press freedom," and that of the 115 nations considered, 55, representing 1.5 billion people, had "free"—more rather than less—press systems, while 29 countries, representing 1.3 billion people, had "controlled" press systems. Ten countries, representing about 434 million people, were in what they called the "transitional zone." Thus, in 1966, they concluded that 45.2 percent of the world's population lived under free press systems, 39.2 percent lived under a controlled system, and 13 percent lay somewhere in between.

Those, unhappily, were the good old days. The same group updated its study in 1967 and concluded that it had been a year of losses rather than gains. In that single year, over 70 percent of the countries measured in the update were reported to have shown varying degrees of loss of press freedom.

Since then there have been dark spots and bright spots. What had been the world's largest democracy, India, abandoned the concept of a free flow of information. Only last year did it re-embrace the concept. There have been gains elsewhere—or at least grounds for hope—in Turkey, Portugal, Greece, Spain. But outweighing the gains have been the losses, especially among the new nations of the Third World, in South Africa and Rhodesia, in Latin America. Three years ago, a prominent British editor estimated that there was no press freedom for three-fifths of the world's peoples. Two years ago, Elmer Lower reported at a Symposium on

Three years ago, a prominent British editor estimated that there was no press freedom for three-fifths of the world's peoples.

World Press Freedom that out of the 138 nations that were then members of the United Nations, true freedom of the press did not exist in more than one-fifth of them, roughly 30 countries. With the admission of new members since then, the proportion has diminished still further.

There is no democracy where there is no free flow of information.

This, of course, is bad for those who believe in democracy. For there is no democracy where there is no free flow of information.

THERE IS an even more ominous and pervasive development. That is UNESCO Resolution 19C,* which has come so close to passage so often in recent years, and which remains under active consideration. Resolution 19C, if we read it correctly, has a direct effect not only on journalists and journalism in the free world, but also on citizens everywhere. Encouraged and supported by the totalitarian states, the resolution would control, through government bodies, the information which comes *into* each country from *outside* that country. Worse yet, it would formalize the policies and procedures altogether too prevalent today by controlling the information—even the information from foreign journalists within the country—that can come out of the country to nations for which the journalists are reporting. It is hard to imagine a more complete and sweeping denial of the principle of the importance of a free flow of information.

UNESCO Resolution 19C, if we read it correctly, has a direct effect not only on journalists and journalism in the free world, but also on citizens everywhere . . . . It is hard to imagine a more complete and sweeping denial of the principle of the importance of a free flow of information.

One can sympathize with the Third World nations in Africa and Latin America whose official representatives so vigorously support these restrictions. Everybody—the president, the Congress, males, females, union officials, corporations, television networks—believes that they are misunderstood and misreported, and sometimes they are. They all believe that not enough attention is paid to them by the press, that they are reported far too negatively. All of them want the positive side, the good about them, to be reported.

We who are publishers or editors know this phenomenon well. It is reflected every day in my mail from all sorts of organizations and groups within the country. We can, by a small stretch of tolerance, understand the feelings behind the UNESCO resolution. And we cannot in good conscience argue that, in general, we here in the United States have reported comprehensively on these nations. We do tend to focus on them only when they are in an ugly crisis.

Whatever our understanding of the aspirations and desires of these nations, whatever the shortfall in our own reporting, we cannot agree with the concepts that underlie Resolution 19C.

But, whatever our understanding of the aspirations and desires of these nations, whatever the shortfall in our own reporting, we cannot agree with the concepts that underlie Resolution 19C. We must not agree—not if we believe in the free flow of information going both into and out of each nation; not if we believe that the truth, as best as we fallible journalists can come to it, shall make us

*Editor's note: A UNESCO compromise declaration on world news coverage that omitted references to government control of news and asserted the need for a free flow of information was adopted unanimously on November 22 by the organization's 20th General Assembly.

free; not if we believe that our functions and responsibilities are not to propagandize but to report, not to serve some special or even national interest, but to be on no side other than the side of honest, accurate, fair information.

With the critical problems that remain here and all over the world, this 20th anniversary of the Freedom of Information Center can hardly be a victory celebration.

And so, with the critical problems that remain here and all over the world, this 20th anniversary of the Freedom of Information Center can hardly be a victory celebration. It can be only a reminder of how far all of us who prize a free flow of information have yet to go.

SO FAR, I have focused on that vital part of freedom of information which, in the main, deals with *access* to news. Obviously, if and when we are shut off from free access to places, events and people, we cannot perform our journalistic responsibility of *gathering* the news. We are remitted to handouts, to management, mismanagement and manipulation of the news—and of the truth. But no matter how free are the access and the right to gather news, the process is wholly incomplete—indeed a nullity—if it stops there. There remains the vital function, the end process, of publishing or broadcasting for and to the public. There is no use gathering news unless we can freely disseminate it to those who wish to attend us. As in the world of computers, if there's garbage in, there's garbage out. But as I understand the world of computers, good, clean data in assures good, clean data out. Not with news: There may be—there are—serious obstacles at the out end that dam up the entire flow.

There is no use gathering news unless we can freely disseminate it to those who wish to attend us.

You know those obstacles. There are many governmental—including judicial—actions that have a "chilling effect," as the judges and lawyers like to put it—a concept which, by the way, however real, is more abstract than it is a visible fact: How many of us have ever seen a journalist whose teeth chatter? Maybe our mouths; never our teeth.

There are many governmental—including judicial—actions that have a "chilling effect," as the judges and lawyers like to put it.

Not surprisingly, since that is the line of business I find myself in, I am particularly concerned by what I regard as the most pervasive of current restrictions on that part of press freedom which relates to the last link in the chain—the link between a news organization and its ultimate consumer, the public. I am talking about that omnipresent intrusion special to broadcast journalism, arising out of the collision between the inescapable fact of licensing, on the one hand, and the First Amendment guarantee of a free press, on the other hand. It defies the basic axiom that has otherwise survived, alive and well in this country, from John Milton, through John Stuart Mill, through our Founding Fathers, through the *Near* case. American broadcast journalism is in the unique position of coming under—more or less—the First Amendment at the same time that we are licensed and subject to nothing less than capital punishment—the power of the government to put us entirely out of business—if we offend a majority of the seven members of the Federal Communications Commission or those who appointed them and on whose good will they themselves are dependent for

American broadcast journalism is in the unique position of coming under–more or less–the First Amendment at the same time that we are licensed and subject to nothing less than capital punishment–the power of the government to put us entirely out of business–if we offend a majority of the seven members of the Federal Communications Commission.

renewal of *their* licenses—or appointments, as they call it.

ARE THE INHERENT DANGERS hypothetical? Not quite, if one reads Agnew's speeches in which he persistently reminded us of what we were already painfully aware—that we are licensed. Hypothetical? Not entirely, if one recalls the memoranda and transcripts that became public in connection with Watergate, when the administration of that time talked seriously about reaching its enemies through licensing—and then, indeed, the licenses were contested. Hypothetical? Not if one recalls, as I would just as soon *not* recall, the candid and inelegant statement by Ken Clawson, President Nixon's director of communications, who said in an interview with the *Los Angeles Times* on May 14, 1974: "I separate out TV from the print media when it comes to criticism. Newspapers are privately owned, but we all have a piece of TV's ass and we are entitled to do something—although I'm not exactly sure what—if it offends us."

We in broadcast journalism are grateful for, and encouraged by, those of our brethren in print who recognize that it will not do to deal with our plight by shouting "Your end of the boat is sinking!"

But my colleagues and I have addressed ourselves to that omnipresent fact of licensing often—and vainly. And we in broadcast journalism are grateful for, and encouraged by, those of our brethren in print who recognize that it will not do to deal with *our* plight by shouting "*Your* end of the boat is sinking!"

But this awful dilemma of licensing is, as I say, one about which we have already said so much, and so rather than pile Ossa on Pelion, let me turn inward and talk not about what others—other nations, our own government, our own judiciary, our own administrative agencies, our own Congress—do to narrow or even shut off at the end of the line the information that flows in at its beginning, but rather what we in journalism ourselves do to interrupt that flow at the cost of the public's right and need to know.

The unhappy fact, which we cannot duck, is that journalists–some of them–are their own worst enemies and hardly friends of a free press.

The unhappy fact, which we cannot duck, is that journalists—some of them—are their own worst enemies and hardly friends of a free press. Over the years, we ourselves have committed some unfriendly acts that haven't done American journalism or the First Amendment very much good. I remember some 40 years ago when a newspaper chain resisted the minimum wage law, then 40 cents an hour, on the ground that it violated freedom of the press. There are many other examples—of excessive First Amendment claims, or of acts of omission or commission because of timidity, or cowardice, or greed, or irresponsibility.

When we condemn press irresponsibility, we do not mean to suggest that some government determination of responsibility is a proper condition precedent to entitlement to First Amendment rights.

I have just used the word irresponsibility—and the linkage between a free press and a responsible one compels me to stop for a moment or two to make a point. When we condemn press irresponsibility, we do not mean to suggest that some government determination of responsibility is a proper condition precedent to entitlement to First Amendment rights. As Tom Wicker wrote in his new book *On Press*, "The American press cannot have responsibility imposed on it by legislation, judicial interpretation, or any other process. Freedom contains within itself the possibility of irresponsi-

bility. No man is truly free who is not permitted occasionally to be irresponsible; nor is any institution." Or as Camus put it even more succinctly: "A free press can of course be good or bad, but, most certainly, without freedom it will never be anything but bad."

The short of it is that while constitutionally, we—or at least print—have the right to be irresponsible short of libel or obscenity, none of us has the *professional* right to be irresponsible.

TO GO BACK to my thesis that journalism sometimes does not do full honor to the First Amendment's guarantee of a free press: What in many ways is the most disturbing current phenomenon is the emergence, more sharply than ever before, of a basic issue that goes to the heart, in my apparently very square view, of what the real functions and responsibilities of a journalistic organization in a democracy are and should be. I suggest to you that the major current issue facing journalism—print at least as much as broadcast journalism—is whether our responsibility is to give the people what they *want*, on the one hand, or, on the other hand, to give them what they *ought to know*. Put another way, it is the issue of whether our major function is to seek out the largest possible numbers of readers or listeners or viewers by finding out what might interest the public and might satisfy those interests in the way that the majority or plurality wants, or whether our central responsibility is to give people what they may not be interested in but *ought* to be.

The major current issue facing journalism–print at least as much as broadcast journalism–is whether our responsibility is to give the people what they want, *on the one hand, or, on the other hand, to give them what they* ought to know.

Translate that from terms of reasonably abstract principle into practical terms which may present to a publisher or editor a choice as excruciating as the choice presented to Jack Benny when a hold-up man demanded of him his money or his life. Which comes first, sound and serious journalism or economic return?—which is often a fancier way of saying circulation, as my print brethren call it, or ratings, as we in broadcasting call it. Ratings or circulation, they are the same thing.

Which comes first, sound and serious journalism or economic return?

Different news organizations are, at different times, drawing the line at different places. You all know the phase that broadcast journalism has gone through—notably at some, but certainly not all, local television stations. You know the whole business of consultants and surveys—the apparatus that marks the widely publicized and criticized tendency to give people the news they want in the way they want it. I happen to believe, perhaps optimistically, that television news has passed through that phase and it has peaked. But print seems to have picked up one of our least desirable practices.

Recently, on the day that Elvis Presley died, one network broadcast news organization made that its lead story. On the same day, President Ford first publicly supported the Panama Canal treaties and Ronald Reagan announced that he rejected the approaches of the administration and would continue his opposition; a competing television news organization made *that* its lead story—and got to Presley further down its broadcast, and more briefly. I'll

concede that this is a reasonably close question of judgment. But the point I would make is the public rationale offered by a spokesman for the news organization that gave priority to Presley: "I don't believe," he said, "people were more interested in the debate over the Canal than Presley's death, a man who had been intimately involved with their lives. *The decision reflects our opinion of what people are interested in.*" (Emphasis mine.)

Broadcast journalism is not alone in the "give-'em-what-they-want" school—or kindergarten—of journalism.

AS I'VE ALREADY INDICATED, broadcast journalism is not alone in the "give-'em-what-they-want" school—or kindergarten—of journalism. Increasingly, print is turning to consultants to find out what the people want and to satisfy those perceived wants. We have a statement by a newly retained consultant for a distinguished news magazine announcing that the news magazine for which he had come to work would become a "bold and fun" magazine. Thank heavens there are no visible—or audible—results yet. The magazine has thus far survived as a serious, sound, professional and excellent one.

We have the good, gray, usually excellent *New York Times* running radio commercials announcing its advertising-carrier new sections: "There's more to the *New York Times* than news." There sure is—even to a full-page devoted to wicker furniture.

We have New York's only afternoon paper, under new management, including in its index Amusements, Classified, Comics, Crossword, Daily Pattern, Horoscope, Sheinwold on Bridge—but dropping any reference to such distinguished columnists as Mary McGrory, Bill Buckley, Max Lerner, Evans and Novak, Jimmy Wechsler, or even Art Buchwald. We have another newspaper in a major city plagued perhaps more than any other city by the problems of urban decay and the tragedies of the inner city whose editor issued a memorandum to his staff that stated in part: "We are aiming our product at the people who make more than $18,000 a year and are in the 20-48 age group. Keep a look out for and play well the stories the city desk develops and aim at this group. It is obvious they won't have a damn thing to do with [our city] and its internal problems . . . Look for sex, comedy, and tragedy. These are things readers will talk about the next day and that's what I want. If we get them talking about our product, our circulation will pop up. That's what it's all about."

"Look for sex, comedy, and tragedy," the editor's memo said. "These are things readers will talk about the next day and that's what I want."

There you have it—about as baldly as the issue can be put. Is this where we're headed? I hope not. Is this why the Founding Fathers adopted the First Amendment to the Constitution? I think not. Is this why that indomitable pioneer Harold L. Cross and the Freedom of Information Center and its supporters should fight so long and so valiantly for a free flow of information, only to see what some journalistic organizations do with it at the end of the line? Of course not.

But, still, it is as easy to deplore this trend as it is to be holier than thou and to oversimplify the issue. For it is an inescapable fact

that you can't do good unless you do well. How useful are your journalistic endeavors if there isn't somebody out there to hear them or read them or look at them? A failed newspaper or a failed news broadcast may be fine for epitaphs and for footnotes to a compendium of journalistic martyrs—gone but not quite forgotten. Yet once failed, they do nobody but the remaining competitor, if any, any good. It all comes back to that slogan on the front page of a little paper called *The Aspen Flyer*: "As independent a publication as finances will permit."

Surely there must be a substantial minimum in a newspaper or a news broadcast which fulfills the basic mission of any news organization: to provide information that people in a democracy need to know in order that they–the ultimate source of power for governance–can exercise their franchise on an informed basis.

But surely there must be limitations beyond which responsible journalism must not go. Surely there must be a substantial minimum in a newspaper or a news broadcast which fulfills the basic mission of any news organization: to provide information that people in a democracy need to know in order that they—the ultimate source of power for governance—can exercise their franchise on an informed basis.

This is not to say that whatever we write or broadcast should not be written and presented in as clear, as lively, and as interesting a form as possible—short of being frenetic. And I am only talking about priorities, about emphasis—for I do not say that human interest stories or even amusing stories do not have their place, just as stories about earthquakes and natural disasters have their place, even though they don't usually help a citizen of a democracy exercise his or her franchise. Rather it is a question of where to draw the line, and how carefully. As that abrasive editor William Lloyd Garrison once wrote, "The success of any great moral enterprise does not depend on numbers." And I suggest that journalism is not only a *free* enterprise, it is also a great *moral* one. Ed Murrow said two decades ago, "If news is to be regarded as a commodity, only acceptable when saleable, then I don't care what you call it, I say it isn't news."

I suggest that journalism is not only a free enterprise, it is also a great moral one.

AND SO FINALLY, what I would say is that it is vital that we who love journalism—whatever its flaws—and believe that democracy—whatever its flaws—is the best system of government yet devised, must not only look for, and fight for, a free flow of information into the beginning of the journalistic pipeline, but we must equally concern ourselves with, and fight against, other intrusions that clog the end of the pipeline—most certainly including our *own* intrusions. A free flow of information, to be fully useful, must include freedom not only from *government* clogging, but also from our own shutting off, or diversion, of the flow.

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Carol J. Loomis

THE TUSSLE FOR INFORMATION

IN THE INTERESTS of full disclosure, I propose to begin by telling you what I propose to tell you, which is a bit about my own experiences in getting information out of the government, about the government's increasing demands for information, and about the attitudes of the people who are being asked to provide it.

Let me start with the government and specifically the Freedom of Information Act.

I have had three occasions in the last year-and-a-half to make requests for material under the Freedom of Information Act. The first two instances involved companies about which I was writing and which had each been recently involved in Securities and Exchange Commission investigations. The SEC's general policy is that Freedom of Information requests will be denied when an investigation is still in progress but will be granted when the investigation is closed—i.e., has been brought to a conclusion one way or the other. In both these cases, the investigations had been closed and I got, in fairly expeditious fashion, the complete files. They were extraordinarily rich in material, particularly in the second case, which involved a bond trading scandal at a major bank.

The SEC's general policy is that Freedom of Information requests will be denied when an investigation is still in progress but will be granted when the investigation is closed.

That's the good news about my Freedom of Information requests. The bad news concerns my third request, which is now pending. In this instance, for a story on the securities industry, I have been trying to get certain financial information about the companies in it, many of which are private. We discovered at *Fortune* that much of the information we needed was in the SEC's public files, though apparently it had never been mined by the press. But we also discovered, as we worked on the data, that information for some companies was missing—that is, the SEC's files were spotty, which is often the case.

So I made a Freedom of Information request asking for the missing data, which the SEC could be assumed to have in its private files. That request turned out to startle the SEC. It seems it had never realized this particular information was going into its public files; in other words, it was there by mistake.

So the SEC said, "No, we will not give you the missing data; it's not public information." "But," I said, "how can you with a straight face argue that a body of information that you have de facto been making public for many years is *not* public?" In my opinion, that is a

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rather ludicrous position for the SEC to be in. The SEC is now thinking the matter over a second time—while I, of course, am running out of time.

Despite this current setback, I am inclined to think on the basis of my admittedly limited experience that the Freedom of Information Act is working relatively well—at least at the SEC.

I must note, however, that the act's very success is creating a certain resistance on the part of business to providing information to government. That is, business says to government: "Look, we don't mind giving *you* this information, but we do mind seeing it eventually land in the hands of the press—and we don't see that you have either the will or ability to prevent that happening. So we will take the only precaution we can, and not give you the information in the first place." There have been several references in the newspapers recently to such business-government arguments, and I would expect them to keep materializing.

That brings me to the matter of getting information out of businessmen.

It is a fact of life today that businessmen are being asked more and harder questions than ever before. The public has grown increasingly insistent about its right to know everything that counts about business. Its insistence has been reinforced by the second fact of life, which is that the government has been over the years forcing business to divulge more and more information about its affairs.

To begin with, it is a fact of life today that businessmen are being asked more and harder questions than ever before. That is true because the business press is bigger today than it has been in the past and is increasingly being swelled by the movement of non-business magazines into business coverage; true also because the business press is better today than ever before; and true, finally, because the public has grown increasingly insistent about its right to know everything that counts about business.

Its insistence has been reinforced by the second fact of life, which is that the government has been over the years forcing business to divulge more and more information about its affairs. For example, publicly owned companies are now required to provide in their annual reports narrative explanations of why their sales and net income are up or down; they are required to divulge advertising expenditures if these are what's called "material." In prospectuses filed in connection with securities offerings, they are required to go into a level of detail that once would have been unthinkable. For example, in a recent prospectus for Caesar's World—a company that, among other things, runs hotels and casinos in Las Vegas—I was amazed to see that the company had been required to divulge—or at least *did* divulge—that it owns a couple of houses in Palm Springs in which it sometimes entertains customers. Presumably, these would include big bettors whom the company would be trying to keep happy.

The whole trend toward more corporate disclosure is continuing. In recent months, the SEC has told companies they must divulge more detailed information about their various lines of business. For example, Time Inc., for which I work, has in its reports to stockholders always lumped its magazine and book operations under one heading: publishing. But the new rules are requiring it to separate the two operations and give sales and profit information for each.

In another recent development, the SEC is requiring companies

to disclose "remuneration" to executives that falls outside the normal definitions of remuneration. For instance, does the president use the company plane for his personal travels? If so, that's got to be disclosed.

A lot of businessmen over the years have stoutly resisted the drive for additional disclosure.

NOT SURPRISINGLY, a lot of businessmen over the years have stoutly resisted the drive for additional disclosure. They have argued that release of information will be competitively damaging. They obviously find it embarrassing, say, to concede that they used the company plane to go to their son's wedding. And in general, like people everywhere, they have been interested in defending the status quo.

But it is also true that many businessmen have serious doubts as to whether all of this disclosure is worth anything. Recently, I ran into those kinds of doubts at a press dinner held by Citicorp, parent of New York's largest bank, Citibank. The press dinner is an annual affair and the format turns the tables on the press: Instead of their asking questions of Walter Wriston and the other Citicorp executives present, these executives ask questions of the press. On this occasion, one of the first questions asked was on this matter of disclosure. Did the press feel—a Citicorp executive asked—that the additional information going out was benefiting anyone—investors, the public, you name it?

Did the press feel–a Citicorp executive asked–that the additional information going out was benefiting anyone–investors, the public, you name it?

He was, of course, talking to a group of people who live and die on information and would not likely have said anything to discourage its flow. But I, for one, could legitimately speak up at this point about a kind of disclosure newly coming out of the banks that I was finding particularly useful. I had in mind details about the banks' foreign loans, which have grown to tremendous size and in many cases are very risky. In my opinion, disclosure of these details has helped investors to focus on the growing importance of this problem and to show their concern. Indirectly, I suspect, the release of details about their foreign loans has led the banks to slow down the making of new ones—and many people would regard such a slowdown as all to the good.

Businessmen suspect that the purpose behind government's push for more disclosure is not the informing of investors–which is the basic goal of the securities laws–but rather the regulation of corporate conduct.

THAT LAST POINT gets to the matter that most bothers businessmen. They suspect that the purpose behind government's push for more disclosure is not the informing of investors—which is the basic goal of the securities laws—but rather the regulation of corporate conduct. For example, the SEC is plainly giving thought these days to requiring companies to disclose their progress in conforming with environmental laws and equal employment laws. If you will think about that for a moment, you will see that such a requirement would be fairly arbitrary. How about all those other laws companies are obliged to obey? Why should they just as logically not have to divulge their progress in complying with the

laws regarding sanitary conditions in the company cafeteria—or stipulate that they are not engaging in industrial espionage, which is illegal? In other words, once you begin to use the disclosure mechanism to try to influence corporate conduct—as the SEC would clearly be doing were it to require additional information about compliance with environmental and employee laws—then where does it all end?

To the extent that the press does its work commendably, the government will be less inclined to stretch its laws to force the disclosure of information.

Perhaps one place it ends is with a conclusion that the press needs to do a continuing job of ferreting out and publicizing poor behavior—wherever it exists—in the corporate world, the public world, or even the journalistic world. To the extent that the press does this work commendably, the government will be less inclined to stretch its laws to force the disclosure of information. My own feeling in this case is that the press is the better institution to do the job.

J. Russell Wiggins

THE INFECTION OF SECRECY

The Earl F. English Lecture

THIRTY YEARS have passed since Basil (Stuffy) Walters, as chairman of the Freedom of Information Committee of the American Society of Newspaper Editors, opened a struggle to preserve the right of citizens to know about the conduct of their own government.

Walters passed the job on to James S. Pope, who quickly saw that the main lack of the ASNE was knowledge of the law and the facts. He induced Harold Cross to become counsel for the committee, and the first fruit of that fortunate move was the publication in 1953 of the Cross report: *The People's Right to Know*. Cross discovered that access to many of the departments and agencies of the federal government was closed and barred, and he commenced a door-opening operation that he continued until his death in 1959.

The effort to improve access to the proceedings and records of government has accomplished a great deal. The old federal "housekeeping statute" (5 USC 22), upon which federal officials had based their obstruction, was repealed—an initial accomplishment made possible by the work of Representative John Moss and his committee. Other gains have included the amendment of the Administrative Procedure Act signed into law by President Lyndon Baines Johnson. State after state has adopted access laws clearing up statutes that had been invoked to bar public knowledge of proceedings and records of state and local governments. Not the least of the accomplishments in the years since the start of the struggle has been the establishment here in Columbia, Missouri, of the Freedom of Information Center.

Much has been accomplished, but much remains to be done if citizens of this country are to possess the right to be informed about the transactions of their own government.

Much has been accomplished, but much remains to be done if citizens of this country are to possess the right to be informed about the transactions of their own government.

THERE ARE FIVE BROAD RIGHTS that society must preserve if its press is to be effective in informing it. They are, in the order of their exercise: the right to get information, the right to print without prior restraint, the right to publish without confiscatory punishment for publication alleged to be wrongful, the right of access to the means of printing, and the freedom to distribute material once printed.

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The right to print without prior restraint was all that "freedom of the press" meant in the age of Blackstone, and it is all that some authorities today think that it means.

Of these five rights, we can say with confidence and assurance that only one of them is absolutely secure in this country today: the right to print without prior restraint. That right was all that "freedom of the press" meant in the age of Blackstone, and it is all that some authorities today think that it means. An eloquent opinion by Charles Evans Hughes in *Near vs. Minnesota* in 1931 so firmly established the right to print without prior restraint that it has not been seriously challenged since. The U.S. Supreme Court upheld it again in the opinion denying the right to restrain publication of the Pentagon Papers.

The battle for the other rights goes on. The fight for them, like the fight for all freedom, no doubt is an endless one.

The right to know is so inextricably bound up with the theories of self-government that its existence in a free society is taken for granted by most people. It is one of those things that goes without saying; but as the late Carl Becker once warned us, we need to take a look at things that go without saying to see if they are still going.

The right to know is so inextricably bound up with the theories of self-government that its existence in a free society is taken for granted by most people. It is one of those things that goes without saying; but as the late Carl Becker once warned us, we need to take a look at things that go without saying to see if they are still going. One of the best expressions of this right I have ever found was in the *London Magazine* in 1747, which stated: "Every subject not only has the right, but is duty bound to inquire into the public measures pursued; because by such an inquiry he may discover that some of the public measures tend toward overturning the liberties of his country; and by making such discovery in time and acting strenuously, according to his station, against them, he may disappoint their effect."

This country's Founding Fathers understood the principle well. Thomas Jefferson said: "My own opinion is that government should by all means in their power deal out the materials of information to the public in order that it may be reflected back on themselves in the various forms into which public ingenuity may throw it." He described the secrecy of the constitutional convention as "an abominable precedent."

James Madison warned: "A people who mean to be their own governors, must arm themselves with the power knowledge gives. A popular government without popular information or the means of acquiring it, is but a prologue to a farce or a tragedy, or perhaps both."

Woodrow Wilson put it bluntly but eloquently in his criticism of the secrecy of congressional committees when he said: "It has got to be put into the heads of legislators that public business is public business."

IN SPITE OF THE FACT that our whole system of popular government is premised on the theory that citizens have a right to know, officials at every level of government, from time to time, attempt the interposition of authority between the people and the proceedings and records of government.

The late Max Webber was one of the first to explain why this happens when government grows beyond a certain size. He explained that in a pure democracy, government is run by amateurs

of similar status. But democracy becomes alienated from its purity when a group grows beyond a certain size and the administrative function becomes too difficult to be satisfactorily taken care of by anyone whom rotation, the lot, or election may happen to designate. As he put it: "The growing complexity of the administrative tasks and the sheer expansion of their scope increasingly result in the technical superiority of those who have had training and experience and will inevitably favor the continuity of at least some of the functionaries."

A pure democracy is a government of amateurs; the government of a bureaucracy is a government of professionals. The bureaucracy is naturally afflicted with an itch to secrecy, which it scratches with mountains of regulations and rules.

A pure democracy is a government of amateurs; the government of a bureaucracy is a government of professionals. Webber shrewdly warns that "wherever increasing stress is placed on official secrecy, we take it as a symptom of either an intention of the (bureaucratic) rulers to tighten the reins or of a feeling on their part that their rule is being threatened."

The flowering of our modern bureaucracy explains in part the rising impulse to secrecy in state and federal government. The bureaucracy is inherently endowed with a defensive resistance to inquiry by citizens. It is naturally afflicted with an itch to secrecy, which it scratches with mountains of regulations and rules.

Another danger to the right to know has arisen out of a fascination with the rights of privacy.

Another danger to the right to know has arisen out of a fascination with the rights of privacy. Secrecy, in the name of privacy, is being imposed upon the hitherto open system of criminal justice in the United States to a degree that threatens us with the hazards of secret arrest. Records hitherto available without question are being "expunged," "purged," "sealed," and otherwise withheld, under new federal laws, Department of Justice regulations, and statutes in 28 states.

Much of the mischief springs from Section 524(b) of the Crime Control Act of 1973, which attempts to govern the release of "criminal history information." The Law Enforcement Assistance Administration issued its rules under this law in May 1975 and revised them in March 1976. Many states have passed laws to bring state acts into conformity with federal desires to ban access to many criminal records.

Maine's 1974 Legislature passed expungement statutes requiring that pardon records be expunged and that arrest records of persons subsequently acquitted be expunged—including records of arrest, detention, complaint, information and indictment.

The statute kept newspapers from reporting acquittal of charges; it denied accused persons their records; it cluttered up the courts with impossible tasks of concealment; it threw a veil of secrecy over criminal justice operations; it deprived accused persons of records needed in their own defense; it denied citizens material needed to prosecute civil cases; and it handicapped job applicants needing written evidence of dismissal of arrest charges.

The Maine statute was repealed last April, but it left behind a legacy of secrecy in criminal history records that subsequently caused difficulty. This Criminal History Information Act has been variously construed to restrict the records of individuals involved in law enforcement when the records are maintained alphabetically,

although the state's right-to-know law requires the release of information filed chronologically.

The Maine Press Association survey revealed that law enforcement officials, in most cases, denied citizen access to even arrest records.

In July of this year, members of the Maine Press Association undertook a survey to find out what police records were being denied citizens. They discovered that law enforcement officials, in most cases, denied citizen access to even arrest records. At its annual meeting on September 8, the Maine Press Association unanimously decided on a formal inquiry into accessibility of police arrest records. The newspapers visited law enforcement agencies to request arrest records on October 16. Only nine officials, out of more than 90 examined, obstructed access.

On October 11, 1978, Attorney General Joseph Brennan issued an opinion on what records are available under Maine's contradictory right-to-know law and criminal history law. He concluded that records generally available to the public include: records of arrests which are filed chronologically, police blotters and other chronologically organized logs, wanted posters, fugitive lists circulated by law enforcement agencies, written decisions of courts, records of civil violations, petitions for pardons, and statistical data. He found not available under the Criminal History Information Act: intelligence files relating to investigations, names of informers, juvenile records, records relating to dismissal or acquittal of criminal charges where a full and free pardon has been granted, records relating to convictions, and guilty pleas or pleas of *nolo contendere*.

The criminal history act is not satisfactory. It introduces into our system elements of secret administration of justice hitherto unknown in this country.

The criminal history act, emerging from the opinions of the Law Enforcement Assistance Administration of the Department of Justice, is not satisfactory. It introduces into our system elements of secret administration of justice hitherto unknown in this country, and it ought to be amended. That its inherently offensive effects were spread far beyond even the intent of the framers of the law was to be expected. Secrecy is contagious and infectious.

OTHER STATES have had similar troubles. Hawaii adopted a privacy statute on June 20, 1974. Honolulu police construed it to mean that they were required to conceal all arrest records. The media filed a suit against enforcement of the law. The Hawaiian Circuit Court held that the act violated rights "to freedom of speech and press under the First and Fourteenth Amendments and under Articles of the Hawaiian Constitution."

Oregon, on June 14, 1975, passed an expungement statute like that of Maine. On September 9, the Legislative Counsel's office issued an opinion that the law made it illegal for officials to tell anyone, including reporters, whether an individual had been arrested, indicted, tried, convicted or imprisoned. On September 15, law enforcement officials put 175 persons in the Umatilla County Jail at Pendleton, during the annual round-up, and held them without bail or access to outside sources. This abuse of secrecy caused the governor to summon the Oregon Legislature into a special session, at which it promptly repealed the mischievous law it

had adopted at the behest of the Law Enforcement Assistance Administration and the American Civil Liberties Union.

Privacy and expungement statutes are aimed at a real human problem—the well-being of innocent accused persons; but they risk an even greater menace to all citizens—the danger of secret arrest.

The American Civil Liberties Union is the strongest supporter of these laws. They are aimed at a real human problem—the well-being of innocent accused persons; but they risk an even greater menace to all citizens—the danger of secret arrest.

Aryeh Neier, executive director of the American Civil Liberties Union, in his testimony before the Senate Judiciary Committee in support of the Tunney bill (S. 2008), July 15 and 16, 1975, said that arrest records and conviction records "often create social lepers who must exist as best they can on the fringes of society." He believed that even records of conviction should not be disseminated "absent the individual's consent."

It is astonishing and dismaying to find an organization that has so often defended press freedom agitating for laws that would bring to this country, for the first time in its history, the dangers of secret arrest, secret trial and secret punishment.

"Only in proportion as publicity has place can any of the checks applicable to judicial injustice operate. Where there is no publicity, there is no justice."—Jeremy Bentham

Jeremy Bentham, England's great 18th century utilitarian philosopher, has warned that "In darkness of secrecy, sinister interest and evil in every shape have full swing. Only in proportion as publicity has place can any of the checks applicable to judicial injustice operate. Where there is no publicity, there is no justice."

The legislation being sought by the ACLU, and supporters like Senator Kennedy and former Senator Tunney, raises the most serious questions about the preservation of open justice in this country. Deputy Attorney General Harold R. Tyler warned in 1975 that the bills then before the Senate raised the issue of a "fundamental conflict between privacy and publicity in the criminal justice process."

IN HIS BOOK *Dossier*, Aryeh Neier cited many examples of persons injured by the disclosure of arrests and convictions. He said that many suffer difficulty in getting employment. Many find it difficult to regain a place in society. Many continue to have difficulty getting jobs even after pardon. These are real human problems.

The question is: Can they be solved by expungement or concealment of records? Is it possible to extinguish wholly the memory of society? Measures that merely limit the number of sources of disclosure (as these measures do) may even increase the dangers of blackmail and extortion by the few who know. There are better ways to diminish such hardships. One is better-trained police. Another is elimination of dragnet arrests. Another is the education of society. Another is continuous effort to enlighten public opinion so that society will help in rehabilitation. Even with such efforts, a problem will remain. But it is not as great a problem as that arising from secret arrest.

What about non-disclosure, expungement, purging or concealment of the records of persons convicted of crimes who have discharged their debt to society by prison terms? Aryeh Neier thinks

such records ought to be sealed or destroyed after a person's release from imprisonment. Should the public memory of transgression be extinguished in this manner to further the possibility of rehabilitation?

Slowly, society has been moving away from medieval notions of branding the convicted. Laws requiring felons to register in a new community lingered into this century, but such laws have largely vanished. Should we now proceed not only to desist from labeling the felon, but to refrain from ever after disclosing his identity and his criminal past?

Unfortunately, there are cases in which a criminal record is relevant as a means of protecting society. The District of Columbia had the Whalen case, in which a convicted rapist and burglar was given a job in a secure apartment for women and while employed there murdered a girl. The employer got no facts of previous crimes from the probation office. The reticence of parole officers cost the apartment owner a $600,000 out-of-court settlement and the parole bureau a punishment of $200,000 for negligence. Should we make this sort of absentminded negligence compulsory?

Criminal history information may be abused, but it sometimes is of great importance to the safety of society. We owe it to those who have defied authority in one way or another not to cast them out of human society forever; but we owe something also to persons who, in the words of Woodrow Wilson, "submit to authority."

We owe it to those who have defied authority in one way or another not to cast them out of human society forever; but we owe something also to persons who, in the words of Woodrow Wilson, "submit to authority."

In any case, the ex-felon's best protection against discrimination is not secrecy, but publicity. He has his best defense in a frank and open acknowledgement of his past. The sort of double-think, newspeak and reality control practiced in the Soviet Union and made famous in Orwell's *1984* does not really work anyway. There is a limit to how much of this can be done even in a dictatorship; and the limit is lower in a society where enough freedom remains so that individuals can refresh their recollection from some unofficial source the government has not been able to expunge. Neither legislatures nor Congress really can undo a deed, unsay a word, or unwrite a line. They can put some obstacles in the way of those seeking truth. That, fortunately, is the limit of their power.

Neither legislatures nor Congress really can undo a deed, unsay a word, or unwrite a line. They can put some obstacles in the way of those seeking truth. That, fortunately, is the limit of their power.

AS A PRACTICAL MATTER, we will have to alter more than the laws on the statute books if we are to relieve utterly those unjustly accused, those convicted and pardoned, and those who have paid the penalty of the law from all consequences of their encounters with the system of criminal justice. We must deal with the laws of life, as well as the laws of legislatures. A man's past, in this unhappy world, follows him like a shadow. It is better to learn to live with the shadow than to attempt to induce an eclipse of the sun to conceal it. It is better to teach society not to run from shadows than to try to persuade it that shadows are not really there.

Concealment and expungement laws are futile when they do not impose secrecy so complete as to be dangerous, and dangerous

Concealment and expungement laws are futile when they do not impose secrecy so complete as to be dangerous, and dangerous to the degree they are not futile.

to the degree they are not futile. They are dangerous because they tend to envelop our system of criminal justice in the kind of secrecy free men always have feared. They give to processes hitherto open a sanction of secrecy that law enforcement officials are bound to construe with logical extensions (as they did in Maine). Secrecy in a society is like an infection. Knowledgeable men will no more submit to a little secrecy in our system of justice than they would submit to a little smallpox. To start this contagion is to risk introducing an epidemic the end of which no man can see.

Knowledgeable men will no more submit to a little secrecy in our system of justice than they would submit to a little smallpox.

In a free society, the people need to know not only the official proceedings and the official records of government; they must have access, as well, to the evidences of wrongdoing or abuse of power that are observed by private persons privy to the vast bureaucracy of the government.

The U.S. Supreme Court has in the past few years struck serious blows at the ability of the press to tap those unofficial sources that often are the only possible avenue by which the people can be fully informed.

The U.S. Supreme Court, which so often has been the chief defense of the right to know, has in the past few years struck serious blows at the ability of the press to tap those unofficial sources that often are the only possible avenue by which the people can be fully informed.

The U.S. Supreme Court opinion in *Branzburg vs. Hayes*, in 1972, decreed that the First Amendment does not provide a newsman with immunity from having to reveal confidential sources to a grand jury. The more recent opinion of the Supreme Court, in *Stanford Daily vs. Zurcher et al*, gave its approval to the use of a search warrant to obtain evidence for use in a riot prosecution, again threatening the ability of a newspaper to protect its sources of information. If that capacity is kept in question by the demonstrated inability or unwillingness of newspapers to protect their files from rummaging law enforcement officials, the resultant disclosure will dry up a fountain of information upon which the press historically has been dependent for facts in one case of bureaucratic fraud after another. Officials of government, guilty of wrongdoing or malpractice, will have thrown about their misdeeds the shelter of judicial authority. The danger of reprisal will restrain individuals bold enough to divulge to inquiring citizens corruption in high places.

Associate Justice Byron White expressed confidence that search warrants, properly limited, would not give occasion or opportunity for officers to rummage at large in newspaper files. It is a confidence no one has been willing to depend upon since the British government caused the home of John Wilkes to be searched on the 23rd of April, 1762. The searchers were looking for written evidence on which to base a punishment for the attacks on the king in Number 45 of North Briton. Wilkes was freed on that count. But in the papers found at his home was a copy of an essay on women that Wilkes had not yet printed. He was sentenced to serve 12 months in jail for a discovery that had nothing to do with the reason for the issuance of the search warrant.

The punishment of the *New York Times* and its reporter M. A. Farber, for refusing to divulge names of sources in the trial of Dr. Mario Jascalevich, casts a further shadow over the ability of the press to protect sources. If these cases diminish the faith of citizens in the

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willingness or ability of the press to maintain their confidentiality, the courts will have closed another door by which society is able to learn about the conduct of government. Citizens will be afraid to rely upon the assurance the press hitherto has been able to give them.

THOSE WHO STILL BELIEVE in the right to know must continue to press for legal power to enforce that right wherever it is put in jeopardy by legislatures, courts or executive department officials. Some notable victories have been won by the press in the last 25 years, but the experience with laws and opinions of the court instructs us that more is needed. Alexander Hamilton made the point that "whatever fine declarations may be inserted in any constitution respecting it (freedom of the press), it must altogether depend upon public opinion, and on the general spirit of the people and of the government."

Even when the laws are sound, and the rulings of the courts beyond reproach, if newspapers, at every step of gathering information about transactions and proceedings of government, encounter the reluctance or refusal of government officials to disclose the ordinary transactions of the day, the flow of information to the public will be delayed and obstructed.

In every government office in the land, there ought to be a presumption that citizens have a right to know what government is doing. The government apparatus ought to be committed to the principle that it has a duty to divulge and disclose in every situation where there is not a plain legal dictate to the contrary.

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Government offices are not the private property of men and women who occupy them by the lottery of election or the accident of political appointment. They have no authority to decide what is to be divulged and what is to be concealed when the law plainly and unequivocally provides for disclosure. We are in peril indeed if we are at the mercy of any perverse, obstructive or uninformed illiterate who wears the hat of authority. Citizens should not have to beg, wheedle, conspire and petition authority for the facts about government.

The struggle to see that the laws of the nation, the states, and the communities are right must be carried on vigorously. In addition, we must work harder to achieve among officials and citizens alike an understanding of the importance of freedom of information so universal that the acts of government can be examined without recourse to prosecution. The right to know must be so uniformly conceded that citizens will seek information without fear and officials will supply it without cavil, reluctance, avoidance or evasion.